(23,257 and 23,258)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY AND THE KERN TRADING & OIL COMPANY.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, THE KERN TRADING & OIL COMPANY, AND T. S. MINOT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1912.

1 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1981.

EDMUND BURKE, Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation) and The Kern Trading and Oil Company (a Corporation), Appellees.

No. 2028.

J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), The Kern Trading & Oil Company (a Corporation), and T. S. Minot, Appellees.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the State of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by Congress on July 27, 1866, (14 Stats. 292,) and the Joint Resolution of Congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining
2 laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by Congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant,

the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

Seventh. If the mineral exception clause was inserted in
6 the patent with the consent of the Defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the Defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated, March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, Under Section 134 of the Act of Congress of March 3, 1911, Certifying Certain Questions to the Supreme Court of the United States Filed April 1, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

7 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1981.

EDMUND BURKE, Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation) and The Kern Trading and Oil Company (a Corporation), Appellees.

No. 2028.

J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), The Kern Trading & Oil Company (a Corporation), and T. S. Minot, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Certificate of said Court Certifying Certain Questions to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six (6) pages, numbered from and including one (1) to and including six (6), to be a full, true, and correct copy of a Certificate

of said Circuit Court of Appeals under the provisions of Section 134 of the Judicial Code, approved March 3, 1911, certifying certain questions to the Supreme Court of the United States in the above-entitled causes, as the original of said Certificate remains on file and appears of record in my office.

8 Pursuant to the orders of the said Circuit Court of Appeals entered in the above-entitled causes on, respectively, the 22nd day of March, A. D. 1912, and the 1st day of April, A. D. 1912, I do hereby further certify that a certified copy of the printed Transcript of the Record in the said Circuit Court of Appeals in each of the above-entitled causes accompanies the foregoing certified copy of said Certificate and is transmitted therewith to the said Supreme Court.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of April, A. D. 1912.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

9 [Endorsed:] No. 1981. United States Circuit Court of Appeals for the Ninth Circuit. Edmund Burke vs. The Southern Pacific Railroad Company et al. Certified Copy of Certificate of United States Circuit Court of Appeals for the Ninth Circuit, Under Section 134 of the Act of Congress of March 3, 1911, Certifying certain Question- to the Supreme Court of the United States.

Endorsed on cover: File No. 23,257. U. S. Circuit Court Appeals, 9th Circuit. Term No. 682. Edmund Burke vs. The Southern Pacific Railroad Company and The Kern Trading & Oil Company. File No. 23,258. Term No. 683. J. I. Lamprecht and F. M. Aiken, trustees, vs. The Southern Pacific Railroad Company, The Kern Trading & Oil Company, and T. S. Minot. Filed June 17, 1912. File No-. 23,257 & 23,258.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

Edmund Burke,
Appellant.

vs.

Southern Pacific Railroad Company and Kern Trading and Oil Company,
Appellees.

Petition to Advance Hearing of Questions Certified to this Court by the Circuit Court of Appeals, Ninth Circuit.

The petition of Edmund Burke, appellant, respectfully shows to this honorable court as follows:

1. Appellant, Edmund Burke, in the above entitled cause was the appellant in the court below in a suit in equity brought against the appellees as defendant in the United States Circuit Court in which he alleged in substance, that the Kern

Trading and Oil Company, a corporation wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866 (14 Stat. 292), and the joint resolution of congress of July 27, 1870 (16 Stat. 382); that the appellant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of land so tested as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid, subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws and made after discovery of mineral on said respective claims; that on July 10, 1894, a patent purporting to convey 440,000 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded in the office of the recorder of Fresno county, California, in which county said lands are situate; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title

thereto being held by the mining locators of which the railroad company had due notice, and having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent were a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said lands and no hearing was had in the land office or in the department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation reading as follows:

"Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include iron and coal lands;" that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but it has never been at any time in the actual, open, peaceful, notorious public or physi-

cal possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any sign or any claim of domination or ownership by any of the defendants; that the said prior locators on said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making a due discovery of mineral upon the land covered by each location and that prior thereto said land had been properly and legally designated by the department of the interior as lands bearing mineral, to-wit, petroleum in commercial quantities, and more valuable for mining than for agricultural purposes.

The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to the lands involved in the suit, that the title of complainant be quieted and that defendants be enjoined from interfering with the property claimed by the complainant and for such other and further relief as might be equitable.

Heretofore a general demurrer for want of equity at circuit was sustained, said court hold-

ing that the patent was itself conclusive of the agricultural quality of the lands described in the patent and bill and that the mineral exception therein being a limitation of the land grant was nugatory and void, whereupon a decree was entered dismissing said bill and thereupon appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit and said appeal was argued and submitted to said court, and subsequently, the court being divided in opinion certified seven questions of law to this court for the stated reason that the questions so involved are of public importance and affect the rights of locators of numerous mining claims and that several similar cases were pending in said court and that other cases would also be appealed to said court and said court being in doubt and divided in opinion made the certain certificate, a copy of which is annexed to this petition and is hereby referred to and made a part hereof.

Your petitioner further says that the title to mineral lands of the reasonable value of seven hundred and fifty millions of dollars is dependent on the decision that may be made herein by this honorable court and that the value of the lands involved in this present controversy exceed twenty-five million dollars in amount and that the suit is one of great public interest in California and great unrest and uncertainty exists concerning the title to thousands of acres of land claimed

by the defendant railroad company under its patents containing the exception of mineral lands and that an early decision will be of great value to all engaged in the production of petroleum.

Your petitioner further says that such uncertainty has been augmented since the decision of Judge Ross sustaining the demurrer and holding the patent conclusive and the mineral exception nugatory by reason of decisions to the contrary by Judge Bean in the United States Circuit Court in the Oregon District and by the Supreme Court of the state of California, while at about the same time the Supreme Court of Oregon held that a patent for known mineral lands was void and by reason of the fact that the United States is contending for the propositions advanced by your petitioner in suits about to be filed urging that the mineral exception is valid and that the effect thereof is to retain to the United States the legal title of the lands in controversy.

Wherefore, your petitioner prays that the hearing on the questions so certified by the Circuit Court of Appeals to this honorable court may be advanced to a date that this honorable court may under the circumstances deem proper.

And your petitioner will ever pray.

EDMUND BURKE,

Attorney in Pro. Per.

EXHIBIT A.

United States Circuit Court of Appeals for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees.

No. 1981.

Whereas, the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that the Kern Trading and Oil Company, a corporation, of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866 (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers

citizens of the United States, pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the department of the interior concerning the character of the land or for the purpose of determining the same,

and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands;" that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the department of the interior as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the com-

plainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas, J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and conscience estopped to resist or deny the binding force and effect of same or any part thereof."

And whereas, the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court

holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted to this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and effect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court, on appeal, three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions. The following questions are hereby certified to the Supreme Court of the United States for its decision:

First: Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any

investigation upon the part of the officers of the land office or of the department of the interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attach a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuances of the patent have been complied with?

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants?

Sixth: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attaching the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and

under an understanding and agreement between it and the officers of the interior department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed): Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under section 134 of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Los Angeles, California,
August 26, 1912.

To Maxwell Evarts, Esq., #365 Broadway, New York City.

Dear Sir: You will please take notice that, upon the coming in of the Supreme Court of the United States, at the beginning of its October

term, 1912, on Monday, October 14, 1912, or as soon thereafter as counsel may be heard, petition for the advancement of the hearing on the questions of law certified by the United States Circuit Court of Appeals, to the Supreme Court of the United States, of which the foregoing is a true copy, will be presented to said Supreme Court for its consideration and action.

Respectfully,

EDMUND BURKE,

Attorney in Pro. Per.

Service of service admitted this ..... day of August, 1912.

.....

Attorney for Appellees.

3

FILED

NOV 14 1917

JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Edmund Burke,
Appellant,
vs.
The Southern Pacific Railroad Company and Iron Trading and Oil Company,
Appellees.

279
No. 688.

APPELLANT'S BRIEF.

Emerson Burke,
Attorney in Pro. Per.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Edmund Burke,
Appellant,

vs.

The Southern Pacific Railroad Company and Kern Trading and Oil Company,
Appellees.

APPELLANT'S BRIEF.

STATEMENT.

Heretofore a general demurrer interposed by the above named appellees to the bill of complaint of the appellant herein was sustained by Judge Ross sitting at Circuit in the Southern District of California.

The appellant thereupon took his appeal and after submission of the same in the Circuit Court of Appeals, for the 9th Circuit, the judges thereof, being unable to agree, made an order certifying seven questions of law to this court.

The certificate which contains all the facts, reads as follows:

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees. No. 1981.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866, (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in

the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands";

that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign

of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained,

and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part of any thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted in this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and affect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions,

the following questions are hereby certified to the Supreme Court of the United States for its decision:

FIRST: DID THE SAID GRANT TO THE SOUTHERN PACIFIC RAILROAD COMPANY INCLUDE MINERAL LANDS WHICH WERE KNOWN TO BE SUCH AT OR PRIOR TO THE DATE OF THE PATENT OF JULY 10, 1894;

SECOND: DOES A PATENT TO A RAILROAD COMPANY UNDER A GRANT WHICH EXCLUDES MINERAL LANDS AS IN THE PRESENT CASE, BUT WHICH IS ISSUED WITHOUT ANY INVESTIGATION UPON THE PART OF THE OFFICERS OF THE LAND OFFICE OR OF THE DEPARTMENT OF THE INTERIOR AS TO THE QUALITY OF THE LAND, WHETHER AGRICULTURAL OR MINERAL, AND WITHOUT HEARING UPON OR DETERMINATION OF THE QUALITY OF THE LANDS, OPERATE TO CONVEY LANDS WHICH ARE THEREAFTER ASCERTAINED TO BE MINERAL.

THIRD: IS THE RESERVATION AND EXCEPTION CONTAINED IN THE GRANT IN THE PATENT TO THE SOUTHERN PACIFIC RAILROAD COMPANY VOID AND OF NO EFFECT.

FOURTH: IF THE RESERVATION OF MINERAL LANDS AS EXPRESSED IN THE PATENT IS VOID, THEN IS THE PATENT UPON A COLLATERAL ATTACK A CONCLUSIVE AND OFFICIAL DECLARATION THAT THE LAND IS AGRICULTURAL AND THAT ALL THE REQUIREMENTS PRELIMINARY TO THE ISSUANCE OF THE PATENT HAVE BEEN COMPLIED WITH.

FIFTH: IS PETROLEUM OR MINERAL OIL WITHIN THE MEANING OF THE TERM MINERAL AS IT WAS USED IN SAID ACTS OF CONGRESS RESERVING MINERAL LAND FROM THE RAILROAD LAND GRANTS.

SIXTH: DOES THE FACT THAT THE APPELLANT WAS NOT IN PRIVITY WITH THE GOVERNMENT IN ANY RESPECT AT THE TIME WHEN THE PATENT WAS ISSUED TO THE RAILROAD COMPANY PREVENT HIM FROM ATTACKING THE PATENT ON THE GROUND OF FRAUD, ERROR OR IRREGULARITY IN THE ISSUANCE THEREOF AS SO ALLEGED IN THE BILL.

SEVENTH: IF THE MINERAL EXCEPTION CLAUSE WAS INSERTED IN THE PATENT WITH THE CONSENT OF THE DEFENDANT, SOUTHERN PACIFIC RAILROAD COMPANY, AND UNDER AN UNDERSTANDING AND AGREEMENT BETWEEN IT AND THE OFFICERS OF THE INTERIOR DEPARTMENT, THAT SAID CLAUSE SHOULD BE EFFECTIVE TO KEEP IN THE UNITED STATES TITLE TO SUCH OF THE LANDS DESCRIBED IN THE PATENT AS WERE, IN FACT, MINERAL, ARE THE DEFENDANTS, SOUTHERN PACIFIC RAILROAD COMPANY AND THE KERN TRADING AND OIL COMPANY, ESTOPPED TO DENY THE VALIDITY OF SAID CLAUSE?

The bill of complaint will be found in the appendix of this brief marked exhibit "A," at page 399

The demurrer will be found in the appendix marked exhibit "B," at page 419

The demurrer in the suit of *Roberts v. Southern Pacific Railroad Company* was heard by Judge Ross in conjunction with the demurrer in this suit and the opinion rendered by Judge Ross was in the Roberts suit and not in this suit and that opinion, together with the memorandum made by Judge Ross in

this suit, will be found in the appendix marked exhibit "C," at page 427

ARGUMENT.

A concise and accurate statement of the basis of the suit is set out in the certificate.

The certification to this court was proper for many reasons and especially for the reason the decision will affect property valued at upwards five hundred millions of dollars and that property, if the illegal claims of the Southern Pacific Railroad Company be defeated, will revert to the United States or will be open to the perfecting of mining locations under the mining laws, by citizens of the United States.

The first question, under the certifications, that is presented to this court is,

I.

"Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be mineral at or prior to the date of the patent of July 10, 1894?"

This question was fully answered in the negative by this court in the case of *Barden v. Southern Pacific Railroad Co.*, 154 U. S. 254. This court held that both ***known*** and ***unknown*** mineral lands were precluded from the

operation of the grant and that lands ascertained to be mineral were subject to location up to the time of a patent made up in the form and in the manner provided for in that decision, and containing a statement of the quality of the land together with jurisdictional recitals.

All the cases on the subject, including *Sanders v. R. R. Co., Shaw v. Kellogg*, etc., hold that in every instance of a railroad land grant mining locations may be made on mineral land embraced in the primary limits of the grant; that such right of location is not affected by the filing of the map of definite location but continues, in any event, up to the time of patent and we assume the first question was certified to this court by reason of our contention that in all known mineral land was excluded from the grant, was reserved and was not subject to patent and that a patent for *known* mineral land was void, and not conveying the legal title the land would remain open to location under the mining laws.

The Statute of *July 27, 1866*, under which a grant of non-mineral lands was made to the Southern Pacific Railroad Company (14 U. S. Stat. 292) reads, there was granted to the railroad company every alternate section of public land;

> "*Not mineral,* designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line * * * provided further, *that all mineral lands be and the same are hereby excluded from the operation of this act* * * * that the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

Section 2346, Title 32, Chap. 6, Revised Statutes of the U. S. 1872 reads as follows:

> "*No act* passed at the first session of the 38th congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the 30th day of January, 1865, shall be so construed as to embrace mineral lands, *which in all cases are reserved exclusively to the United States,* unless otherwise specially provided in the act or acts making the grants."

By section 18 *of the Act of July 27, 1866,* the Southern Pacific Railroad Company was authorized to connect with the Atlantic and Pacific Railroad Company at a designated point and it was further provided that the Southern Pacific Railroad Company "shall have similar grants of land, *subject to all the conditions and limitations herein provided.*"

By the joint resolution of June 28, 1870, all the conditions and restrictions embodied in *section 3 of the Act of July 27, 1866,* are made applicable to the grant to the Southern Pacific Railroad Company.

The joint resolution makes it the duty of the secretary of the interior, subject to the restrictions therein contained, to issue patents to the Southern Pacific Railroad Company "*expressly reserving* all the rights of actual settlers, together with the *other conditions and restrictions*, provided for in the third section of said act (July 27, 1866)."

It appears by the certificate, and in the record of this action, that the lands in controversy were *known mineral* lands *long prior* to the grant and subsequent patent to the defendant railroad company and that such lands were held under and covered by valid subsisting mining locations before and at the time of patent, which locations had been made by qualified citizens of the United States, under the mining laws of the United States, and which notices of location had been duly recorded in the duly organized Coalinga mining district within which district said lands were embraced and that wholly without notice and on the *ex parte* application of the Southern Pacific Railroad Company, and without any proof, hearing, contest and *wholly without* any evidence, testimony, decision or determina-

tion by the land department of the agricultural or mineral or other quality of the land a patent containing an exception of known and unknown mineral lands issued to the Southern Pacific Railroad Company on July 10, 1894; that said defendant corporation accepted and recorded said patent; that said mineral exception of mineral lands was inserted in the patent *pursuant to express agreement and assent of the patentee.*

It further appears by the record that at no time did the lands in controversy pass into the possession, domination or control of the patentee or its lessee; that the lands on the date of entry by this appellant (March 2, 1909) were wild, unoccupied mountain mineral lands wholly unfit for any agricultural purpose and that the prior locators having failed to perform their annual labor for the year 1908 this appellant and his associates went upon the land on the 2d day of March, 1909, and exercising a forfeiture arising by reason of the non-performance by the prior locators of the required annual labor on said land for the year 1908, *relocated said lands.*

In connection therewith and wholly apart from any other question in the suit and as a wholly independent legal proposition this appellant contended that said patent was wholly void as against said original locators and that an estate of freehold remained in them

down to the moment of forfeiture and relocation by this appellant and thereupon a possessory title and a new estate of freehold passed to this appellant sufficient to maintain his action to quiet his title as against the Southern Pacific Railroad Company which was asserting prejudicial claims to said lands under said patent.

Under section 738 of the California Code of Civil Procedure a person in or out of possession may maintain an action to determine claims concerning real property against a person in or out of possession and the California Supreme Court in Buchner v. Malloy, 155 Cal. 255, while holding the owner of an equitable title could not maintain an action to quiet title against the owner of the legal title, also held that the owner of a possessory title under the mining laws of the United States was regarded as the owner in fee and could maintain any form of action, and especially an action to quiet title against the owner of the legal title in an effort to protect his possession, and the same rule has been repeatedly announced by the California Supreme Court. (See Van Ness v. Rooney, 160 Cal. 130.)

The reply to this proposition was that the patent was absolutely conclusive and that the court would presume that there were no mining claims or mining locators existing and, further, that appellant could not

urge that the patent was void and his relocation was valid because there was no privity at the time of relocation or rather at the time the patent issued to the defendant railroad company between the United States and this appellant—Judge Ross did not, so far as his opinion in the Roberts case shows, pass on the subject and we assert.

THE PATENT WAS, IN ANY EVENT, ABSOLUTELY VOID BY REASON OF THE KNOWN MINERAL QUALITY OF THE LANDS AND THE LEGAL TITLE DID NOT PASS THEREUNDER TO THE SOUTHERN PACIFIC RAILROAD COMPANY BUT REMAINED IN THE UNITED STATES WHICH HELD THE SAME IN TRUST FOR THE PRIOR LOCATORS DOWN TO THE MOMENT OF FORFEITURE AND RELOCATION WHEN A NEW ESTATE OF FREEHOLD AROSE TO THE RELOCATORS!

We contend at this point that the patent being void by reason of the forestated facts, the controverted mineral lands were open to relocation, *independent of the mineral exception*, and the patent subject to attack by reason of the fact the land was known to be mineral in character and under mining location and wholly without any agricultural value and that the defendant railroad company patentee had notice of all of the same at the time it applied, *ex parte*, for patent.

1. *In U. S. v. C. P. R. Co. et al.*, 84 *F.* 219, the Federal Circuit Court, citing *Stoddard v. Chambers, 2 How (U. S.) 284*, said, it being established the land was chiefly valuable for mineral at the time of the issuance of the patent, *the title could not be held valid* because *acquired contrary* to law. The syllabus in the case, which we submit is an accurate digest of the whole, reads:

> "A patent granted, under the Act of *July 27, 1866, which excepted mineral land, is void* if at the time of the issuance of the patent the land was *known* to be chiefly *valuable for mineral.*"

2. *In Van Ness v. Rooney, 160 Cal. 130*, it was held by the California Supreme Court that a patent issued for land known to be mineral was void and subject to attack.

3. *In Kansas City Mining and Miling Co. v. Clay, 29 P. 9 (3 Ariz. 326)* the Supreme Court of the then territory held that though a patent issued by the United States on a pre-emption entry is conclusive of claimant's qualifications to obtain land and of his good faith in the location and improvement, *it may be impeached* by showing that at the date of final proof there was *known to exist* mineral deposits which forbade it passing to entry and the court tersely repudiated the contention then made

(as made herein by the railroad patentee) that the presumption flowing from the patent was that the land was not mineral and was not known to be mineral, and the case has been cited favorably by state and federal courts, and in *Old Dominion C. M. & S. Co. v. Haverly*, 90 P. 336 (Arizona) the same court said:

> "We cannot, therefore, assert that it is a fact to be shown at the time of application *that the land does not contain* known mineral lands and that the patent is conclusive in that point. We conclude, therefore, that the exception of 'known mines or salines' under the pre-emption law should be construed as preventing passing under the act, of any title to such mines as are known to exist at the date of the application for patent *and hence as constituting* one of the exceptions to the conclusiveness of a patent mentioned by the court in *Smelting Co. v. Kemp* for want of authority or power in the land department to pass by pre-emption patent the title of the government to such mines.
>
> *The title remaining in the United States,* it follows that, when such patent issued, it might be collaterally attacked in an action at law by proof that such mines were known to exist at the time of the issuance of the patent, and its character as a conveyance of such mines be defeated."

These two decisions were made independent of the fact that at the time of the issuance of the patent the land *was not held under mining location.*

The case was cited approvingly in *Garrard & Silver Peak M. Co.*, 82 *Fed. 578*, by Judge Hawley and by the Circuit Court of Appeals, 9th Circuit in *94 Fed. 989*, which affirmed the judgment rendered by Judge Hawley.

4. *In United States & Culver, 52 Fed 81*, Judge Parker construing section 2318 of the revised statutes *that in all cases* lands valuable for minerals shall be reserved from sale, said:

> "If these lands were valuable for mineral, the defendant *could have no title* against the plaintiff, as the lands purchased by defendant were not liable to purchase as agricultural land at the time of purchase. In such case the title to the lands in the defendant could not be held valid because acquired against the law. *(Stoddard v. Chambers, 2 How. 284).*"

The same rule is laid down in *United States v. Blackburn, 48 P. 904*, and *United States v. Reed, 28 Fed. 482*, and *N. P. Railroad Co. v. Barden, 46 Fed. 610.*

5. In *Deffeback v. Hawke, 115 U. S. 392*, it was held:

> "1. *No* title from the United States to land known at the time of sale to be valuable for its minerals, etc., can be obtained under the homestead or pre-emption laws or townsite laws *or in any other way* than as presented by the laws authorizing such sales."

It has been the continuing contention of the Southern Pacific Railroad Company in this litigation that the rule of law applying to homestead and pre-emption patents *applied* to the patent in controversy.

Davis v. Weibold, 139 U. S. 507, as explicitly *construed* in the Barden case *(154 U. S. 288)* as well as the foregoing case, *squarely* holds *that no title* to known mineral lands could be obtained by a townsite or agricultural patent—The case cites the California case of *Alford & Barnum,* 45 Cal. 482: and the Nevada case of *Merrill & Dixon, 15 Nev. 401,* both railroad land grant cases, and other cases, all of which hold that if the land was more valuable for mining than for agriculture, at the time of the application for the patent, or at the time of the issuance of the patent, *the patent is void.*

The same rule, along other lines, is succintly applied in *Colorado Coal & Iron Co. v. U. S.,* 123 U. S. 307-328, and *U. S. v. Iron Silver Mining Co.,* 128 *U. S.* 673, the first arising under the coal land act and the latter under the placer mining act.

In *Sullivan & Iron Silver Mining Co.,* 143 *U. S.* 431, Mr. Justice Brewer said as follows:

> "In this, the district judge trying the case simply followed the opinion theretofore expressed by the circuit

judge to the effect that prior location (mining) was necessary before a vein or lode could be adjudged a *known* vein or lode *within the exception in the patent* and provision of section 2333, R. 5.

In this ruling was error as has been repeatedly determined by this court *(Reynolds v. Iron Silver Mining Co.*, 116 *U. S.*, 687; *Noyes v. Mantle*, 127 *U. S.* 348, 354.")

Counsel for the Southern Pacific Railroad Company in the courts below contended that lode, placer, townsite and mining patents generally were governed apart from agricultural patents and that the patent to the Southern Pacific Railroad Company was to be construed under the law relating to agricultural patents but it must be remembered that the railroad land grant patents *do not* issue under any agricultural law like a homestead or desert entry patent: they are land grant patents under a specific grant that, like the townsite law and patents, *exclude* mineral land; and counsel contended that the foregoing citations were not applicable as their patent was agricultural and the *"known"* mineral prohibition did not extend to them and counsel cited below, as we assume they will here, in support of their contentions, the cases of *Doe v. Waterloo*, 54 *Fed.* 939; *Horsky v. Moran*, 21 *Mont.* 345; *Carter v. Thompson*, 65 *Fed.* 329, and *King v. McAndrews*, 111 *Fed.* 860, *which were all* instances of *voidable* patents, *is-*

sued within the jurisdiction of the land department and each holding that only an antecedent or prior title could collaterally attack a patent in cases of *fraud, imposition and mistake,* the patent in each instance having *duly* issued within the jurisdiction of the land department and after actual investigation, determination and decision and the clearly elementary distinction between those patents and the one at bar is that our patent issued for *known* mineral land and was *without* the jurisdiction of the land department.

Counsel have not cited and cannot cite a case holding a patent to be conclusive except in instances where there has been a hearing and actual determination, between the parties, before the patent issued or where there had been an actual *determination* of the quality of the land in instances where the application was *ex parte.*

The great distinction under this point is that the land in controversy was not only known by the defendants to be mineral at the time of the application for the patent but the defendants and all the world had *notice* of a mineral quality of the land and of the existence of the antecedent estates of freehold based on the recorded mining locations.

Discussing the question of notice in an analogous case, *U. S. v. C. P. R. Co. et al.,* 84 *Fed.* 221, Judge Morrow said:

"I am of opinion these defendants had notice, actual or constructive, of the character of the land which they had contracted to buy from the grantee (R. R. Co.) and its trustees * * * *Notices of location had been filed of record in the mining recorder's office* of the Forks of *the Butte Mining District* before the defendants (grantees of the R. R. Co.) entered into their contracts to buy the land, etc. * * * "

In our case the locations of the prior locators were recorded in November, 1891, in the office of the recorder of the Coalinga mining district and the application for patent was made by the Southern Pacific Railroad Company in *May,* 1892, and patent issued July 10, 1894.

Counsel sought in the courts below to establish the proposition that the patent was *voidable* and not void and that only an antecedent title could maintain the solitary action to impress a trust upon the patent—that such a suit could be maintained under proper circumstances is elementary but it is not here—only in instances of voidable patents *issued within the jurisdiction* of the land department may such a suit be maintained; it *cannot* be maintained in instances of *void patents.*

Gold Hill Mining Co. v. Ish, 5 *Org.* 104.

In that case a federal patent issued in the presence of a mining location and the Supreme Court of Oregon held the patent

to be absolutely void. If the patent is void it is an absolute nullity and spells—nothing—and it required no action on part of the United States to clear the record; if there had been an actual contest in the land office and an actual decision then the patent would have been voidable and an attack or an action to charge the patent with a trust could have been maintained by the prior locators if they had maintained their possession.

7. In *Van Ness v. Rooney,* 160 Cal. 131, and in which, after full argument an application for a rehearing was denied, the California Supreme Court held that while it was the general rule that the issuance of a patent is a conclusive determination that the land is of a character that it might be disposed of under a *general* law providing for the disposition of public land, *not mineral,* the effect of the issuance of a patent for land was agricultural is to transfer to the patentee all mineral lands or deposits *subsequently* discovered within its boundaries and which were *not known* to exist at the time the patent issued. *But* the rule is equally well established that mineral deposits *known* to exist at the time the patent issued do not pass under it and the court cited in support of such proposition the cases of *Reynolds v. Iron Silver Min. Co.,* 116 *U. S.* 687; *Davis v. Wiebbold,* 139 *U. S.* 507; *Kansas Min. & Mill Co. v.*

Clay, 3 *Ariz.* 326, and *Loney v. Scott*, (129) 112 *Pac.* 173.

Heretofore we have referred to all of such cases except *Loney v. Scott* (decided in 1911) and in that case the Oregon Supreme Court held as follows:

> "The rule is that a patent to government land transfers to the patentee all veins, lodes or mineral deposits within its boundaries unless such mineral deposits *were known* to exist at the time of the issuance of the patent in which latter case the *known* mineral deposits do not pass by the patent."

The case was that of a placer locator contesting with an agricultural patentee and the court held the patent was *void* and did not pass the legal title and various cases were cited by the court and amongst them the Arizona case of *Kansas City Mining and Milling Co. v. Clay, supra.*

The same proposition was maintained by this court in the well known case of *Morton v. Nebraska*, 88 *U. S.* 660, in an instance where a patent issued for known saline lands taken up under a military bounty warrant. This court said, page 674:

> "The pre-emption Act of September 4, 1841, (5 Stat. at large, 456) declares "no lands on which are situate known salines *or mines* shall be liable to entry * * * it does not strengthen the case of

> plaintiff that they obtained certificates of entry *and that patents issued* subsequently on these certificates. It has been repeatedly held by this court that patents for lands which have been previously granted, reserved from sale or appropriation *were void*. The executive officers had no authority to issue a patent for the lands in controversy because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law." (*Burfenning v. Chi., St. St. Paul, etc.*, 163 *U. S.* 321.)

The reservation of salines, etc., under the act mentioned was not any more specific or special than under the subsequent and existing act which *reserved* all mineral lands and precluded them from all forms of entry except under the mining laws. This court held in the Morton-Nebraska case that the general reservation of salines, etc., rendered a pre-emption patent for the same void. The opinion in that case shows the salines were *known* and for that reason the patent was held void; the record in this case shows the lands were not only *known* to be mineral but public notice of that fact was given by the recordation of the notices of location. The Morton-Green-Nebraska attack was collateral and the attack on the patent and certification was wholly based on the fact the lands were known to be saline lands and consequently the collateral attack was sustained by this court on the ground

that the certification and patent were void, being in violation of the general reservation of all "lands on which are situate *known* salines or mines."

We submit our proposition in such regard is identical and the former case is conclusion of this branch of our controversy.

9. In *Horsky v. Moran*, 178 *U. S.* 211-212, this court said:

> "On the face of the patent there is nothing *to suggest any exception*—while it might be conceded that in an action *at law* by a claimant under that patent the existence of the mining claim, at the time of its issue, might be shown and be a valid defense to a recovery of so much of the ground as was included within the mining claim, and in that event it may perhaps be not inaptly said *the patent to that extent was void.* (*U. S. v. Stone*, 2 *Wall* 525). In such cases courts of law will pronounce them *void.* The patent *is but evidence* of the grant and the officer who issues it acts *ministerially* and not judicially."

If our patent is void, then the legal title remained in the United States and the land was open to location under the mining laws of the United States at the date of our entry.

10. Judge Sawyer in *Amador v. South*, 36 *Fed.* 670, speaking of the effect of an agricultural entry, said:

> "By entry and payment by A, *there being no mines* on the land, the entire estate to the center of the earth vested in him."

11. The cases of *Hermocilla v. Hubbell*, 89 *Cal.* 5; *Garrard v. Silver Peaks Mining Co.*, 82 *F.* 578, *Aff.* 94 *Fed*, are based on the case of *Mining Co. v. Consolidated Mining Co.*, 102 *U. S.* 168, in which it was held the question was:

"Were the disputed premises at the time of the grant *known* to be mineral; that is known to be valuable for minerals," and this court pointed out the analogy between the (school grant) act and railroad land grants, at *pages* 174-5, by saying:

> "It is a strong corroboration of this view that congress in section 12 of this same statute giving 72 sections for a seminary of learning, *declares no mineral lands* shall be taken under the act. * * * We find a similar provision in the grant to the Pacific Railroad Companies. Taking into consideration what is well known to have been the hesitancy and difficulty in the minds of the congressmen in dealing with mineral lands * * * it follows the land in controversy being mineral land * * * did *not pass* to the state under the school section grant."

Here again this court passed squarely on the question of a general reservation of mineral lands and pointed out that the reservation of such lands in the school land grants and said, "We find a similar provision in the grant to Pacific Railroad Companies." Of course there was no patent under consideration in the citation but the court was passing on a general reservation of mineral lands. If a grant of known mineral lands was void a patent of such mineral lands would not be in any better position under the ruling of this court in the Morton-Green-Nebraska case. If, after a grant of lands supposedly mineral, a patent issued after examination and an actual decision of the land department that the lands *were not* mineral, a totally different question would arise, but that question is not in this case. The bill of complaint herein alleges the land was known to be mineral, not only at the time of patent, but at the time of the grant and, admittedly, there was no subsequent examination of the lands except wherein and through its geological department the land office declared the lands in controversy to be mineral lands bearing petroleum in commercial quantities.

Counsel met our citations by reiterated reference to the cases of *Carter v. Thompson*, 65 *Fed.* 329; *King v. McAndrews*, 111 *Fed.* 861, and *Scott v. Lockey In-*

vestment Co., 60 *Fed.* 36, none of which are in point.

The syllabus in *Carter v. Thompson* so often cited by counsel is misleading and is at variance with the text of the decision—the case did not turn on the question of the *known* mineral character of the land—the court said:

> "The location of the claim under which complainant asserts title was made September 7, 1893. The townsite patent was issued June 15, 1872.
>
> The claim (contention) seems to be made that this patent was issued before the land *was* offered for sale at public auction and the question having been *passed* on and *decided* previously, it follows, as of course, that a subsequent mining claimant could not attack, *as the patent was only voidable and not void.*"

All of which is true and is not contested by us and it is the only point in the *Carter-Thompson* case.

So it is with their repeated citation of *King v. McAndrews, supra,* where it was rightfully held that the land department had jurisdiction to hear and determine, *as it did,* the claims of homesteaders and townsite claimants and issued patents therefor in accordance with *such decisions* and that such patents evidenced the legal title to the lands and were impervious to attack. We never contended otherwise.

It was an action of *ejectment* and the defendant in that action *sought to review* the action of the land department acting within its jurisdiction and there was no question arising in that case of the segregation of the land from the public domain, at the time of application for patent, by reason of prior valid, subsisting and duly recorded mining locations. The whole gist of the case was that a collateral attack could not be maintained in an action of ejectment, that in such an action the legal title running the patent controlled, as it was a case of a *voidable* patentee. The rule in actions of ejectment has no application here.

Counsel in the courts below made copious reference to *Scott v. Lockey Investment Co.*, 60 *Fed.* 36, a case that stands alone in principle and which has never been cited or referred to by any other court so far as we have, after diligent search, been able to find.

It holds that where an estate *of freehold has been created under the mining laws of the United States* under a mining location properly and legally made, that the estate of freehold so created and maintained *might* be *abolished* by a subsequent grant of the same land *made* to another person by the United States under another law for another purpose. And the court so decided on the authority of a previous decision made by himself. Commenting on such extraordinary proposition we content ourselves

by saying that such is not the law, never was the law and never will be the law, in the instance of a valid, perfected, subsisting location of mineral lands made under the mining laws of the United States. In that case the judge said (and on his saying the Southern Pacific Railroad Company rests its case):

> "Could the plaintiff with this possessory mining right, maintain an action against the United States to quiet its title to this possessory right even if it could sue the United States in such an action? The answer must be, he could not. How, then, can such an action be maintained against its grantor which has the title the United States possessed in the land, that is the paramount title in fee?"

Our answer is that in the presence of a perfected, valid, subsisting mining location, an equitable title, the United States held, until patent or legal cancellation of the location, the paramount title in trust for the mining locators and its attempted subsequent grant or alienation to another person under any law *would be void* and the patent would carry no title. *Our further answer is that all suits relating to the possessory title, by legislative authority, may be litigated in the courts of the United States independent of and without regard to the paramount title, which was not the case at the time of the rendering of the decision.*

In order to clinch this proposition and to show the utter futility of the contention of counsel we cite:

A—In *Noyes v. Mantle* 127 *U. S.* 349-351, this court, speaking of the right of a miner after location of his claim, said:

> "The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof what they had done in locating the claim and of subsequent expenditures to a specified amount in developing. *Until the patent issued, the government held the title in trust* for the locators or their *vendees.*"

B—In *Haws v. Victoria C. M. Co.*, 160 *U. S.* 303, this court said:

> "The possession under a claim established according to law, is fully recognized by the acts of congress, *and patent adds little* to the security of the party in continuous possession of the mines he has discovered or bought."

C—This court in *St. Louis Mining Co. v. Montana Min. Co.*, 171 *U. S.* 650-655, held that where there is a valid location of a mining claim, the *area becomes segregated from the public domain and is the property of the locator.* Can it be successfully contended here that such a *segregation* of the lands in controversy was not in force at the time the patent

issued? And if that segregation was in force, as the record shows it was, will it be successfully contended that it was within the jurisdiction of the land department, on an *ex parte* application, and without cancellation of the outstanding title to patent the land to another? The suggestion is, in our opinion, absurd, but it is the position of the Southern Pacific railroad that this court must, in order to uphold the patent, assume that there was no segregation.

Analagous rulings in 26 *Am. & Eng. Emc'y*, 381; *Michigan Land and Lumber Co. v. Rust*, 168 *U. S.* 589-593; *Hawley v. Diller*, 178 *U. S.* 476-489; *Clark v. Herington*, 186 *U. S.* 206, and in the courts below we cited upwards of one hundred cases on the subject but will not weary this court by piling up authority on an elementary proposition.

The second question certified to this court is intertwined with the first question and we shall necessarily cite many authorities, not heretofore cited, which have a direct bearing on both questions, severally and in their blended character.

The second question reads:

DOES A PATENT TO A RAILROAD COMPANY, UNDER A GRANT WHICH EXCLUDES MINERAL LANDS, AS IN THE PRESENT CASE, BUT WHICH IS ISSUED WITHOUT ANY INVESTIGATION UPON PART OF THE OFFICERS OF THE LAND OFFICE OR OF THE DEPARTMENT OF THE INTERIOR AS TO THE QUALITY OF THE LAND, WHETHER AGRICULTURAL OR MINERAL, AND WITHOUT HEARING UPON OR DETERMINATION OF THE QUALITY OF THE LANDS, OPERATE TO CONVEY LANDS WHICH ARE THEREAFTER ASCERTAINED TO BE MINERAL?

It will be noticed that the question is limited to lands *"thereafter ascertained to be mineral.* That is *not* the question in controversy, as we alleged that the lands were *known* to be mineral lands, not only at the time of the patent, but at the time of the grant. The question argued in the court below was "Was the patent conclusive of the agricultural quality of lands *known to be mineral prior to the issuance of the patent,"* and no contention was advanced by us on the proposition that the lands were *subsequently* ascertained to be mineral. The entire records conclusively supports us. We alleged that the lands were known to the defendant railroad prior to and at the time of the issuance of the patent to be mineral; that prior to and at the

time of the issuance of the patent the lands were held under divers valid, subsisting, recorded mining locations, of which the defendant railroad had notice.

We alleged a prior discovery of mineral and a subsequent forfeiture and a subsequent relocation which, *ipso facto,* was based on the prior discovery. No issue was raised by either side in the courts below concerning any discovery of mineral subsequent to the issue of the patent, but as it arises under the exception in the patent of known and unknown mineral lands, we will discuss it in *extenso,* observing, however, that the issue in this suit in such connection relates more particularly to the validity of the exception in its effect of cutting out *known mineral lands from the grant and patent* as pointed out in *Van Ness v. Rooney* and other cases cited under the first question certified to this court, although we contend that a patent issued in the manner pointed out in the second question is not conclusive of anything not actually determined or decided.

This question is to be determined independent of any reference to a patent containing a mineral exception and we shall discuss it on the basis that the patent does not contain an exception or reservation of mineral lands.

The record discloses that in May, 1891, the Southern Pacific Railroad Company made an application, *ex parte*, for patent on approximately 440,000 acres of land and on July 10, 1894, received a patent for the same. The patent will be found in the appendix, marked Exhibit "D," and the entire land office record on which the patent is based will be found in the appendix, marked Exhibit "E."

The record also discloses that the lands in controversy are included in the patent; that such lands were known to be mineral lands and more valuable for mining than for agricultural purposes long prior to the application for the patent and that the Southern Pacific Railroad Company had notice of such fact for many years prior to its application for patent.

The record also discloses that prior to and at the time of such application the lands in controversy were covered by valid, subsisting recorded mining locations, duly made by qualified citizens of the United States, all of which the Southern Pacific Railroad Company had notice and knowledge, but notwithstanding the same, the defendant railroad company knowingly and fraudulently caused a false and fraudulent application to be made for a patent of said lands, falsely and knowingly alleging that the lands sought were not interdicted mineral lands and that thereupon and thereafter and

wholly without notice to the said locators and wholly without any investigation of or determination of the quality of the lands and wholly without the jurisdiction of the land department, the patent issued and was delivered to and accepted by the defendant railroad company under such conditions.

The Southern Pacific Railroad Company contends that the *issuance* of such a patent is absolutely conclusive of the agricultural quality of the richest mineral lands in the world. We contend that under the circumstances the patent is not conclusive and is only conclusive of the facts actually passed on and determined by the land department.

Strictly speaking, the Southern Pacific Railroad Company does not contend that the patent is conclusive of the agricultural quality of the land *but that the issuance of the patent* is the decision and determination of such agricultural quality of the land and that we may not inspect the antecedent, record or the patent to ascertain what was decided or determined.

In other words, the defendant railroad company, while unpliedly admitting that the patent as written is worthless to it as a measure of defense, contends that the *mere issuance* of the patent is a conclusive determination of all its claimed rights to the lands in controversy.

The defendant railroad company is forced to such a contention by reason of the fact that the patent shows upon its face that there was no determination of the quality of the land and, consequently, and independent of the patent, and in face of the admitted fact that the land was and is of great value, a legal myth or presumption to the contrary is created *by the mere physical issuance of the patent.*

A. Turning to the patent we find, (1) that it *erroneously* recites that by the act of July 27, 1866, and the joint resolution of June 28, 1870, there was made a grant to the Southern Pacific Railroad Company of "Every alternate section of public land, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, *and within the limits of twenty miles on each side of said road.*"

The court will note that the statutory words *"not mineral"* are not contained in the recital and nowhere appear in the patent. The effect of such omission indicates either (a) that the land department arbitrarily disregarded the mandatory provisions of the law in deciding what character of land the defendant railroad company was entitled to under the granting acts and thus fell into a grave mistake of law, or (b) decided that the defendant railroad com-

pany was entitled to receive twenty sections per mile within the limits of twenty miles even if all the land was wholly mineral in character.

The defendant railroad company therefore is forced to contend that the patent is of no consequence and *thus impeaching* its own patent and collaterally attacking the same, is forced to assert that the *issuance*, the making up and signing the patent, independent of its contents and recitals, and of its antecedent record, is the *conclusive* base of its title.

We, on the contrary, do not assail the patent except under the first question, but *uphold it as it is written.* It is worth just what it shows to be worth and no more.

B. The patent recites there was a grant of lands to the amount of twenty alternate sections per mile *within the limits of twenty miles of the road.*

Such recital cannot be conclusive for two reasons: (1) the granting statutes provided for a grant of non-mineral land to the amount (within states) of *ten* alternate sections per mile and the recital in the patent to the contrary is untrue and if the land department so decided its finding is in violation of law and therefore void, and, (2) it is a physical and mathematical impossibility to *include twenty alternate sections, each a mile square* within the

limits of *twenty miles* from the road as a grant, of twenty alternate sections, each a mile square, per mile would require a limit of *forty miles* from the road as only ten alternate sections could be included within the twenty mile limit which is the limit designated by the granting statutes.

Now, we contend that in any view of such recitals, we have the right to go to the record to ascertain what, if any, decision was made by the land department that resulted in the issuance of the patent. If the patent was issued without a record or on an imperfect record the patent becomes imperfect and of no avail.

The court will observe that the patent contains no specification of the character of the land or any statement of its quality. It is absolutely impossible for this court to say from an inspection of the patent what quality of land is conveyed by it and there is absolutely *nothing contained in the patent or record* that will support any presumption that the land was mineral or non-mineral except the statement that the *list* of lands selected by the railroad company were approved by the local land officers at Visalia, California, while it is apparent from the record of the general land office there was no decision at all of the quality of the lands selected by the Southern Pacific Railroad Company by the general land office, and the approval of the local land officers at Visalia, California, was simply

that the records of the local land office contained no adverse claims and that so far as the records of that office showed the list of selected lands *was clear*, only that and nothing more.

We contend that in order to make a patent conclusive as to the quality of the land it attempts to convey there must be included in the patent *a statement of the quality of the land*. This court has said so and has never intimated to the contrary.

The fact that the positive direction of this court in such direction has been disregarded by the ever changing subordinates of the general land office only proves the necessity of enforcing the mandates of this court.

Before passing to the decisions of this court on that subject, it will be well for this court to take judicial cognizance of the physical conditions of the public lands in California at the time of the Act of July 27, 1866, and at the time of the railroad application for a patent to the lands in controversy, namely, May, 1891. That portion of California then as now was arid, sterile, wild, uncultivated, inhabited then only by the prospector and adventurous explorer—without water, little rainfall, without grasses or vegetation; it did not appeal to the settler or homesteader. The main line of the Southern Pacific Railroad Company, originally projected to pass

through that portion of California, had been abandoned, was but a mere stub, finding its ending in what is now the great and wonderful Coalinga oil field. The lands had been surveyed in the shiftless manner that characterized the early western surveys, of the Benson and Hyde surveying contracts, the history of which has been spread on many a record in many a court of civil and criminal jurisdiction.

There had been no decision of the quality of the lands by the land department; there had been no examination or classification of the lands by the department of the interior at that time, and in view of an impending bond issue by the Southern Pacific Railroad Company, then poor and decrepit, now rich and powerful, the defendant railroad company was willing to take a patent on any terms and conditions and accordingly applied for and secured the patent now under consideration.

Prior to the *Barden decision* some of the western judges, and particularly *Judge Sawyer*, were insistent and consistent contenders of and for the proposition that only *known mineral* lands were precluded from passing to the railroad grantees under the various congressional land grants to railroads and that contest was finally carried to this court in the Barden case and for all time settled. A minority of this court strongly contended then that unless

a time and manner was specified at which and by which the question of title could be for all time settled, great uncertainty would result and land titles would remain insecure, and thus it became necessary for this court in the *Barden case* to indicate how the question of the quality of the land could be forever settled and the views expressed by this court in that case have never been changed or modified and the case has been cited *upwards of fifty times.*

The court then said that the question of quality would be settled by the patent, *not by the issuance of a patent*, but by a patent issued after *examination, determination* and with a *statement of the quality of the land embraced in and set forth in the patent.* At page 330 (154 U. S.) this court said:

> "The fact remains that under the law the duty of *determining* the character of the lands granted by congress, *and stating it in the instruments transferring the title of the government* to the grantees, reposes in officers of the land department Until such patent is issued, *defining* the character of the land granted, *and showing it is non-mineral, it will not comply* with the act of congress in which the grant before us was made to plaintiff."

[As we will see later in this brief the defendants were forced to contend that the word "it" did not refer to the "patent" but to the "land department."]

Counsel in the courts below said such "remark" was *obiter dictum,* but if so then all "remarks" relating to a patent and its effect contained in that famous case are *obiter.* But it is not so; the question was necessarily before the court and the issues therein involved could not be decided properly without passing on the effect of a patent to be issued under the railroad land grants.

Again this court in that case, at page 331, said:

> "It (the land department) can hear contestants and decide upon the respective merits of their claims.
>
> It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, *specifying that the lands are of the character for which a patent is authorized.*
>
> *It* can thus determine whether the lands called for are swamp lands, timber lands, *agricultural lands,* or mineral lands *and so designate them in the patent which it issues.* The act of congress [identical with this act] making the grant to plaintiff provides for the issue of a patent to the grantee for land claimed *and as the grant excludes mineral lands,* in the direction for such patent to issue, the land office can examine into the character of the lands *and designate it in its conveyance.*"

Again this court said in that case, (page 349):

> "It (the land department) *must also decide whether lands are excepted because they are mineral lands,*" and again, page 332, "*The determination* of the fact by these officers that they are the one or the other will be considered as conclusive."

The following is the entire discussion of this subject by the court in that case [pp. 326 to 334]:

> "The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith.
>
> "It is conceded to be of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the interior department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims

to them under the legislation of congress. *It can hear contestants* and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the *patent* provided by law, *specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues.* The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, *and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.*

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In *Smelting Co. .v. Kemp*, 104 *U. S.* 636, 640, 641, this court thus spoke of the land department in the transfer of public lands:

"'The patent of the United States is the conveyance by which the nation passes its title to portions of the public

domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to *hear testimony* as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that *their judgment* as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. *Their judgment* in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal *in an action of law.*'"

The last portion of the opinion is simply a reiteration of an elementary proposition that in an action of ejectment the legal title must pervail and that a collateral attack may not be made on a *voidable* patent issued within the jurisdiction of the land department and has no application to a suit in equity containing averments constituting a direct attack.

"In *Steel v. Smelting Co.*, 106 *U. S.* 447, 450, the language of the court was that:

" 'The land department, as we have repeatedly said, was established to supervise various proceedings, whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, *it must* consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, *the nature of the land*, and whether it is of the class which is open to sale. *Its judgment* upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation.' (Another instance of the rule in actions of ejectment.)

"In *Heath v. Wallace*, 138 *U. S.* 573, 585, it was held that:

" 'The question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" *is a question of fact properly determinable by the land department.*'

"And Mr. Justice Lamar added:

" 'It is settled by an unbroken line of decisions of this court in land jurisdiction, that the *decisions* of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.'

"If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, *it must also decide whether lands are excepted because they are mineral lands.* It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because *the evidence* was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the secretary of the interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, *he would not perform his duty,* as stated in *Knight v. Land Association,* 142 *U. S.* 161, 178, as the 'Supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the land department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be found. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. *The determination* of the fact by these officers *that they are one or the other* will be considered as conclusive.

"In the case of the Central Pacific R. R. Co. v. Valentine, 11 Land Dec. 238, 246, the late secretary of the interior, Mr. Noble, speaks of the practice of the land department in issuing patents to railroad lands. His language is:

" 'The very fact, if it be true, *that the office of the patent is to define and identify the land granted,* and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the land department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands FOUND to be mineral in character at any time before the date of pat-

ent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though *unadvisedly* by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by congress, *and stating it in instruments transferring the title* of the government to the grantees, reposes in officers of the land department. Until such patent is issued, *defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant,* even when all the acts required of the grantees are per-

formed, only passes a title to non-mineral lands; *but a patent issued in proper form,* upon a judgment rendered *after a due examination of the subject by officers of the land department,* charged with its preparation and issue, that the lands *were non-mineral,* would, unless set aside and annulled by direct proceedings, stop the government from contending to the contrary, and as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

To fully understand and appreciate the effect to be given the *Barden case* in holding, as it does repeatedly in the language of the court, that the granting act distinctly reserves and excludes all mineral lands, it is important to observe the distinction which the court makes between the case which it is considering and the two cases referred to in the opinion by Mr. Justice Field, on pages 321, 322, 323, and 324, to-wit: the cases of

Deffeback v. Hawke, 115 *U. S.* 392, *and*
Davis v. Weibbold, 139 *U. S.* 507.

The following is what this court said upon the subject of those two cases:

"There is, in our opinion, no merit in any of the positions advanced by the plaintiff in support of its claim to the mineral lands in controversy. The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of

all mineral lands is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel *a construction favorable to the grantor.*

"Some reference should be made here to the language used in the cases of *Deffebach v. Hawke,* 115 *U. S.* 392, and *Davis v. Weibbold,* 139 *U. S.* 507, as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the opinions in both of the cases cited, must take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

"The case of *Deffebach v. Hawke* arose in this wise: The plaintiff asserted title to mineral lands under a patent of the United States, founded upon an entry under the laws of congress, for the sale of mineral lands. The defendant, not having the legal title, claimed a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on portion of the public lands appropriated and used as a town site,—that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose. And it was held by this court that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper could be obtained under

the pre-emption or homestead laws, or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. These three cases, those under the pre-emption and homestead laws and town site act, were classed together. It was found that under the pre-emption and homestead act lands containing known saline deposits and mines could not be purchased. In the town site act it was provided that by virtue of its provisions no title could be acquired to any mine of gold, silver, cinnabar or copper, or to any valid n.ining claim or possession held under existing laws. And under the mineral act of congress it was provided that in all cases lands valuable for minerals should be reserved from sale except as otherwise expressly provided. The court held that under those acts land could be purchased which was not known to be mineral; and from this the inference was drawn that only lands known at the time of the sale to be valuable for minerals could be excluded, and if they were not thus known to be valuable for minerals a sale might be had. *This was not a case arising upon a grant like the one under consideration at present;* but, inasmuch as the law of congress authorized lands valuable for minerals to be sold generally under the mineral act, and excluded from sale mineral lands when claimed for homesteads or pre-emption or for town sites, it was thought that these conflicting provisions of law would be reconciled by simply excluding from the sale lands known at the time to be mineral. *But that case has no bearing upon the present one involved the construction of an act of congress declaring in express terms that no mineral lands shall be conveyed by the grant made.*

"The case of *Davis v. Weibbold* was an action on the part of a mineral claimant who had obtained a patent in January, 1880, of a parcel of land within the exterior limits of Butte town site, subsequently to the patent for the town site.

"When the entry of the town site was had and the patent issued, and a sale was thereafter made to the defendant of the lots held by him, it was not known—at least, it does not appear that it was known—that there were any valuable mineral lands within the town site, and the question was whether in the absence of this knowledge the defendant, who claimed under the town site patent, could be deprived by the laws of the United States of the premises purchased and occupied by him, because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer under whom the plaintiff claimed. The court said that the declaration that no title could be acquired, under the provisions relating to such town sites and the sale of lands therein, to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws, would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such was held not to be the necessary meaning of the terms used; in strictness they imported only that the provisions by which the title to the land in such town sites was transferred should not be the means of passing a title also to land, or to valid mining claims or possessions thereon; but that they were to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying

exceptions in acts of congress of mineral lands from grant or sale. Thus read, the court held that they merely prohibited the passage of title under the provisions of the town site laws to mines of gold, silver, cinnabar, or copper, which were *known to exist on the issue of the town site patent and to mining claims and mining possessions*, in respect to which such proceedings had been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried *unknown* in the depths of the earth. The patent, for the town site was therefore held to cover minerals subsequently discovered in the lands patented. The patent was in law a declaration that minerals did not exist in the premises when it was issued, and the subsequent acquisition of minerals, in the town site was within the specific authorization of the act of congress that all valuable minerals should be open for exploration and sale. *There is a marked distinction between that case*, under the town site law, *and the present case, under a grant of congress excluding mineral lands from its operation*, although it is conceded that some of the language used is broader than the necessities of the case required. *Yet the effect* given to the town site patent will be found not inconsistent with the views hereafter expressed in the present case."

Mr. Justice Brewer lead the minority of this court in the *Barden* case but later, as was his duty, became reconciled to the decision and cited it on this very question in *Shaw*

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v. Kellogg, 170 *U. S.* 312-341 when he pointed out that it was the duty of the land department to *examine into and determine the quality of the* land before the issuance of the patent and to *express in the patent that the land is non-mineral* before a grant of agricultural land passes unassailably to the grant.

No modification of the decisions of this court are to be found except in the utterances of a subordinate of the land department who in 1904, in writing an opinion on the *ex parte* and uncontested application of a land grant railroad said:

> "If any statement in this connection (statement of quality of land) were deemed necessary in the patent, *which is not believed to be the case,* it should be to the effect *that the lands patented are found to be non-mineral in character and otherwise subject to the grant.*" (39 L. D. 342 per Mr. Hall.)

Otherwise the decisions of this court on such subject stand unharmed and unimpugned though as a matter of fact Mr. Hall, so far as the land department is concerned, "recalled" the decisions of this court much to the gratification of the land grant railroads!

1. THE PATENT ISSUING WITHOUT EXAMINATION, OR ADJUDICATION AS TO THE AGRICULTURAL QUALITY OF THE LANDS IS NOT CONCLUSIVE NOR RES JUDICATA ON THAT QUESTION AS THE FACT OF QUALITY WAS NEVER ADJUDICATED NOR PASSED ON TO AN ACTUAL DECISION!

Leonard v. Lennox, 181 *Fed.* 760;
U. S. M. Co. v. Lawson, 134 *Fed.* 775-6 *aff* 207 *U. S.*;
Montana etc. v. St. Louis, 102 *Fed.* 430;
Nesbit v. Riverside Independent District, 144 *U. S.* 610;
Roberts v. N. P. R. R. Co., 158 *U. S.* 1;
Board of Com. v. Sutliff, 97 *Fed.* 270;
Board of Com. v. Platt, 79 *Fed.* 567;
Linton v. National, etc., 104 *Fed.* 584;
Aetna v. Board, etc., 117 *Fed.* 82;
Last Chance etc. v. Tyler etc., 157 *U. S.* 687;
23 *Cyc. (Notes) p.* 1223, *etc.*

A. THERE MUST BE SOME EVIDENCE ON WHICH AN ACTUAL FINDING IS MADE TO MAKE A PATENT CONCLUSIVE AS TO THE QUALITY OF THE LAND.

Love v. Flahive, 33 *Mont.* 348;
U. S. v. Minor, 114 *U. S.* 233;
Parsons v. Venzke, 61 *N. W.* 1036 *aff* 164 *U. S.* 89;

Jordan v. Smith, 12 *Okla.* 703;
Hartwell v. Havinghorst, 196 *U. S.* 635;
affirming 11 *Okla.* 189, *which contains the facts.*

In every case that may be cited by the appellees in the subject it will be found there had been an *actual decision* in the land office before the issuance of patent.—*Counsel will not produce,* council cannot produce the land office record of any of their citations that will not show there had not been an actual determination and formal decision as to the quality of the land antecedent to the issuance of the patent.

Puget Mill Co. v. Brown, 54 *Fed.* 987;
U. S. v. Coos Bay etc., 89 *Fed.* 151;
Wharton on Evidence, Sec. 822;
Potter v. Randolph, 126 *Cal.* 461-2;
Cragie v. Roberts, 6 *Cal. App.* 309-12;
U. S. v. Mackintosh, 85 *Fed.* 333.

To lighten the labors of the court we will briefly digest the cases bearing on the subject.

1. *The Steele case,* 106 U. S. 447:

"Necessarily, therefore, it (the land department) must consider and *pass* upon the qualifications of the applicant, the acts he has performed to secure the title, the *nature of the land* and whether it is of the class which is open to sale. *Its judgment*

upon these matters is that of a special tribunal and is unassailable except by direct proceedings for its annulment or limitation."

Could language be plainer? *Must pass on the questions and render a judgment?* Does that mean the department *may* not pass on the questions, need not render a judgment but that a mere patent free from any statement or recital or any record is conclusive that the things that were not done, were done?

2. *The Burfenning case,* 163 *U. S.* 321:

"Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, *presents a* question of fact, *not resting on record, dependent on oral testimony;* and it cannot be doubted *that the decision* of the land department, one way or the other, *in reference to these questions is conclusive.*"

That is the test—*a decision* whether the land was mineral or not and the decision is *res adjudicata.*

3. *N. P. R. R. Co. v. Sanders,* 166 *U. S.* 620:

"Whether the lands sought to be purchased as mineral lands were of that character *was a matter for determination* in the first instance by the land department."

4. In the *Barden case*, 154 U. S. 328-9, it was said:

> "If the land department *must decide* what lands shall not be patented because reserved, sold, granted or otherwise appropriated, or because not free from pre-emption or *other claims* or rights at the time of the lien is definitely fixed, *it must also decide* whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral or in refusing to patent them *because the evidence was insufficient to show* that they contained minerals, etc."

If the land department is required by law *not* to issue a patent until it *has* actually passed on and decided the quality of the land, is not such a patent *void* as it issued in violation of law.

There was *no* evidence *even* offered by the S. P. R. R. Co. at any time before the issuance of the patent.

5. *Wright-Roseberry case*, 121 U. S. 488:

> "2. The *action* of the secretary of the interior in identifying such lands is conclusive against collateral attack; but when he has neglected or failed to make the identification it is competent for the grantees of the state to protect their rights from being defeated, to identify the lands in any other appropriate method."

In that case the court permitted a collateral attack to be made on a pre-emption patent by showing that the lands were swamp and had passed to the state under a previous grant and the patentee of the state defeated the federal patent by showing the secretary of the interior had failed to pass on the quality of the controverted land. Under this case what becomes of the claim *that the mere* issuance of the patent is conclusive or that the secretary passed on and determined the land to be agricultural and not swamp *prior to the time he issued the pre-emption patent?*

6. *Ehrhardt v. Hogaboom,* 115 *U. S.* 67:

The Supreme Court said it was the duty of the secretary of the interior to *determine the quality of the land.*

7. *French v. Fyan,* 93 *U. S.* 169:

> "But a careful examination will show that it (decision in R. R. Co. v. Smith, 9 Wall. 95) was done with hesitation and some dissent in the court. *The admission* (of testimony) was placed expressly on the ground *that the secretary had neglected or refused to do his duty* * * * the matter to be shown is one of *observation and examination*, whether arising before the secretary whose duty it was to primarily *decide it*, or *before the court*, whose duty it became because the secretary had failed to do it. * * * "

"That is our position exactly; without any action of any kind; without any investigation, without decision, the patent issued."

8. The rule of the *Borden case*, 154 *U. S.* 326-331, the only rule applicable to land grant cases and land grant patents is:

> "*The fact remains that under the law the duty of determining* the character of the lands granted by congress and *stating it in instruments* transferring the title of the government to the grantees, reposes in officers of the land department until such patent is issued *defining the character* of the land granted and *showing it is non-mineral* it will not comply with the act of congress in which the grant before us was made to plaintiff. The *grant*, even when *all* the acts required of the grantees are performed, *only* passes a title to non-mineral lands; *but a patent issued in proper form, upon a judgment* rendered after a *due examination* of the subject by officers of the land department, charged with its preparation and issue, *that the lands were non-mineral* would unless set aside and annulled by direct proceedings, etc."

At another place in the opinion the court said:

> "*It can hear contestants* and *decide* upon the respective merits of the claims. *It can investigate* and settle the contentions of all persons with respect to such claims. It can *hear evidence* upon and

determine the character of the lands to which different parties assert a right; and when the controversy before it is *fully* considered and ended it can issue to the rightful claimant the patent provided by law, *specifying* that the lands *are of the character* for which a patent is *authorized*.

"It can *thus determine* whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands *and so designate them in the patent* which it *issues*. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed *and as the grant excludes mineral lands* in the direction for such patent, the land office *can examine into the character of the lands and designate it in its conveyance.*"

The court below did not attempt to construe adversely this ruling which is as plain and positive as the language of the Federal Supreme Court could make it and which is the language that must be followed. No reference was made to it in the Circuit Court but at one point in its opinion the court said there was no patent before the Supreme Court in the *Barden* case for its consideration; true, but the granting act required a patent to issue, and in the relied on and cited *Shaw-Kellogg* case there was no *patent* for consideration before the court and, what is more, no *patent* was required or permitted by the Baca grant and it is difficult to see how the misconstrued *obiter* remarks of Mr. Justice

Brewer concerning a patent not before the court, should have such great weight, and the remarks of Mr. Justice Field concerning the form and nature and effect of a patent that must issue under a grant under consideration by the court should have no weight at all! If the *obiter* remarks of Mr. Justice Brewer in a "known" mineral land case that required no patent are so potential as affecting an "unknown" mineral land case issuing under a railroad land grant, why not stop to ponder over his express citation from and endorsements of the Barden rule concerning patents when he speaks in Shaw v. Kellogg (p. 339) of the necessity of an *examination of the character of the land by the interior department* and *expressing and stating in the patent that the land is non-mineral* before a grant of agricultural lands is unassailable collaterally or otherwise. It seems to us there may be no mistake arising from this language.

Then again, no patent adjudication was required in the Shaw-Kellogg case. Mr. Justice Brewer in that case aptly said there was no magic in the word patent; the title in that case finally passed when the grantees made their selection and that selection was approved in the manner required by congress. That ended the matter. The court could not review the action of the land department in cases arising under Mexican grants or under treaties. There was a

trial, a hearing, proofs, examinations, actual adjudications and actual exterminations of all questions affecting a *grant* that *only* excluded *known* mineral land—of land *known* to be mineral at the time of the selection and approval, and of course it would be absurd to contend that after such an adjudication there could be a limitation of the grant by a reservation of "unknown" mineral lands which were *not* precluded by the Baca grant and which was, as pointed out by Justice Brewer, analogous to homestead, pre-emption and townsite grants which precluded only "known" mineral lands from their respective grants.

Counsel, driven to extermity in the court below as to the want of examination or determination of the quality of the land, argued that there were a multitude of cases holding that adequate examination is presumed by the *issuance* of the patent and *that the patent (not its contents) is the determination and expression of quality,* and that the *issuance* of the patent under any "particular" grant is the *"expression and statement"* that the land is of the character contemplated by the grant and constitutes a final declaration by the government that all requisite preliminary steps have been taken and that to state the facts in the patent would be superfluous (although the *Barden* and *Shaw-Kellogg* cases say a "statement" must be inserted), and to support this view the well known rule

of presumption of regularity was cited and with it the cases of *Minter v. Crommelin,* 18 How. (U. S.) 87; *the Kemp case,* 104 U. S. 636 (which restricts the rule to cases arising in a *court of law?*); the *Moffat case,* 112 U. S. 24; the *Steel case,* 106 U. S. 450, *and the opinion of Judge Ross in Doe v. Mining Co.,* 54 F. 935, and some other cases to which we will refer.

The answer to the proposition so advanced is:

1. That in all the cases cited there had been actual investigation and actual proof offered of the facts *determined* and the antecedent rulings so made could not be attacked collaterally either on the ground of *falsity* or *insufficiency of proof,* etc., except in case of fraud, imposition and mistake, the fraudulent patentee would be charged as trustee for the rightful owner.

2. In all the patents issued in all the cases cited by the demurring defendants it will be found *they were based on records and findings of fact made up before the patent issued* and that all patents that have so been held as conclusive contained proper and conclusive recitals under a perfect record, and the entire case is all summed up in the case of *De Cambra v. Rogers,* 189 U. S. 119, in which it was contended that a decision rendered in a *contest* in the interior department between two pre-emption claim-

ants was not conclusive because the secretary had not heard or read the testimony but he had simply signed his name to a decision made up in the department. The Supreme Court said:

> "It is hardly necessary to say that *when a decision has been made by the secretary of the interior,* the court *will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination.*"

That is our exact contention! As was said in the *Winona case,* 67 F. 948:

> "The test of jurisdiction is whether the tribunal has power to *enter on the inquiry, not whether its conclusion was right or wrong.*"

That is the exact situation here—*that there was no inquiry—that there was no conclusion!* There must be a *perfect* record to make the patent conclusive.

Let me illustrate: Suppose the department had issued a patent for land earned by alleged construction of eight twenty-five mile sections of railroad when no construction had been entered on at all and there had been no investigation or determination, would the patent be a conclusive determination that two hundred miles of railroad had been constructed and in operation? It would not be possible to attack the

patent in such instance in an action of ejectment but in a direct attack either by the United States or by one in privity with the paramount title the rule would not be applicable.

This court said in *Brown v. Huger*, 21 *How.* 305, and *Broadman v. Reid*, 6 *Pet.* 345, *that a patent must only be issued on a legal record*, and must be *interpreted* as a whole. If the mere issuance of a patent is conclusive of all jurisdictional facts, it would further appear that the rule is only applicable in courts of law, in actions of ejectment, and that it has no application to a suit in equity.

In this connection the thought occurs to us that a patent is not any more solemn nor conclusive than the judgment of the Circuit Court of the United States would be in our action to quiet title, and in that court *only the actual facts* determined would be conclusive and *res adjudicata*, and it must be remembered that the patent (appendix D) clearly shows there is no reference to any quality, and the words *"not mineral"* are omitted in the purported recital of *the Act of July 27, 1866.* Under our overments our suit to quiet title is purely equitable in its nature as the defendant being out of possession are not, under the California rule, entitled to a trial by jury.

The demurrer admits that the patent is not based on a record of examination and adjudication, and it appears affirmatively on the face of the patent that there was no adjudication, express or implied, that any particular legal subdivision of the land described in the patent was non-mineral. The defendants, as we have seen, contend that the issuance of the patent was an implied determination and adjudication of the land department that all of the land was non-mineral in character. The contention is conclusively refuted by the language of the patent, which unmistakably shows that there was no such determination; *that the land department, acting in accordance with its then settled practice of forty years, based upon a construction of the statute,* instead of determining whether any particular legal subdivision of the land was mineral or non-mineral, expressly excepted all mineral land, if any such should be found. It is absurd, in the face of this exception, to contend that there was a determination and adjudication that all the land was non-mineral. For it is not, and never has been, the law that a judgment, order or adjudication is *res adjudicata* as to any matter which, from an inspection of the record it appears was not passed on or decided,—and this, even though the court or officer had *authority to,* and under the pleadings *might have,* determined such question. Such question or fact is not *res adjudi-*

cata, for the reason that the record shows affirmatively that the point or fact was not decided or determined.

It is a rule of universal application that where it appears on the face of the judgment that certain matters were not adjudicated, the judgment is not *res adjudicata* as to such questions. The fundamental principle that for a judgment to be *res adjudicata* it must appear that the precise question in issue arose and was determined in the former suit is well settled. In *Russell v. Place*, 94 *U. S.* 606, 608, *the court said:*

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made,

when the record leaves the matter in doubt, such evidence is admissible."

And in *Packet Co. v. Sickles*, 5 *Wallace* 580, 592, the court said:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

A claim that the matter in issue has already been passed upon by the court in a former action cannot be sustained in the face of a record from which it expressly appears that the matter was not passed upon.

Thus in *Central Trust Co. v. Clark,* 81 *Fed.* 269, 273, (C. C. A., 8th Circuit), the facts are thus stated:

> "One C. brought an action against the D. R. Co. to recover the price of a certain machinery. A counterclaim for damages for delay in delivery was put in. Pending this suit, proceedings were taken to foreclose a mortgage on the railroad. C. obtained judgment against the railroad company, and also intervened in the foreclosure suit, claiming a preference for the price of his machinery over the bonds secured by the mortgage. It affirmatively appeared by the record of C's judgment that the issue raised by the counterclaim was never tried in that suit, and that the receivers appointed in the foreclosure suit were never made parties to it. *Held,* that the receivers were entitled to show, if they could, that the railroad company had been damaged by a delay on C's part in delivering the machinery."

The court said:

> "We may concede for present purposes that if the record in the New York suit showed that the merits of the alleged counterclaim had been investigated and determined in that suit, or even if it was silent on that subject, no further trial of that issue could be permitted; but, inasmuch as the New York record sows affirmatively that the issue with respect to the non-delivery of the gear wheel within the time limited was not in fact tried and determined, we are of opinion that it is a proper subject for consideration in the present proceedings. We rest our conclusion on this point, not alto-

gether on the ground last indicated, but upon the principle that one who seeks relief purely upon equitable grounds should himself do what is equitable. In the present proceedings the intervenor interposes a claim against the proceeds of the mortgaged property, and insists that it shall be paid prior to the mortgage indebtedness, not, however, because he has a lien upon the mortgaged property such as a court of law would recognize and enforce, but because of the circumstances under which certain machinery was supplied to the railway company. The intervenor himself has no standing in court to maintain his claim to a preference without going behind the New York judgment, and showing the origin and nature of the demand on which the judgment rests. When, therefore, he invites an investigation of those questions for the purpose of establishing an equitable right to which the judgment alone would not entitle him, we think that the mortgage bondholders should be permitted to show, if they can, that they were not benefited to the extent of the full value of the machinery which was supplied to the railway company, but, that, by reason of the failure to deliver the same within the contract period, the company sustained some loss."

Condon v. Knoxville, etc. R. Co. (Tenn. Chancery Appeals) 35 *S. W.* 781, 783, is a case in which the court relied almost entirely upon federal decisions, and the opinion is very strong. The court said:

"The judgment of a court of competent jurisdiction upon a point or question litigated between the parties is

conclusive in all subsequent controversies between the same parties or their privies, depending on the same point or question. * * * And 'the plea of *res adjudicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it.' *Aurora City v. West*, 7 *Wall.* 96. But the principle as thus announced is not at all in conflict with statements made in previous and subsequent decisions of that eminent court, attaching proper limitations or making specific modifications of the scope and extent of *res adjudicata* as evidence, or as a technical estoppel. * * * And it is true that the estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps, or the groundwork upon which it must have been founded. So it may be said that "it is allowable to reason back from a judgment to the bases on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from such conclusion.'

Burlen v. Shannon, 99 *Mass.* 200;
Scotland Co. v. Hill, 112 *U. S.* 183, 5 *Sup. Ct.* 93;
Boyd v. Alabama, 94 *U. S.* 645.

"And when not in conflict with the record, proof *aliunde* may be received to show what was decided, and when thus shown it will be an estoppel as *res adjudicata.*

Doty v. Brown, 53 *Am. Dec.* 350,
and authorities cited.

Russel v. Place, 94 *U. S.* 606;
Warwick v. Underwood, 3 *Head* 238.

"But we deny that any case, either from the courts of the United States or elsewhere, governed by the general principles of the common-law jurisdiction, goes to the extent of holding that a judgment of a competent court having jurisdiction of the parties and subject-matter is *res adjudicata* as to matters and issues which it did not decide, but which, from the face of its record, it refused to decide and excluded from its decision, although under the pleadings it might have decided, and had the right to decide.

Packet Co. v. Sickles, 5 *Wall.* 592;
Aurora City v. West, 7 *Wall.* 96;
Cromwell v. Sac. Co., 94 *U. S.* 351;
Russel v. Place, *id.* 606;
Davis v. Brown, *id.* 423;
Lea v. Lea, 96 *Am. Dec.* 772.

and extended note."

In *Hamlin v. N. Y. etc. R. Co.*, 176 *Mass.* 514, 57 *N. E.* 1006, it was held that in a proceeding to determine whether or not a railroad company has the right to maintain gates across an alleged right of way, a final decree for the complainants in a former proceeding is not available as a bar where the right to maintain the gates was left open by the decree in such proceeding. The court said:

"The rulings excepted to were right. The pleas set up the original bill and the proceedings thereon as a bar to the present bill. But the question whether

the defendants have a right to maintain gates at the crossing was left open by the proceedings pleaded in bar. The final decree in favor of the plaintiffs in those proceedings, which decree was ordered affirmed by this court, was 'without prejudice to the rights of the defendants, if any they have, to maintain proper gates or bars across said way,' and the decree entered after the decision of this court under its rescript was 'without prejudice to any right of the defendants to maintain proper gates or bars across said way.' The defendants' exceptions are therefore overruled."

In *People v. Hall*, 104 *N. Y.* 170, 177, the court uses this language:

"The remaining question arises in respect to the estoppel of the former judgment. The prior action was founded upon the title of the relator under his prior nomination and appointment of January 15th, 1885. The defendant set up, as in this case, his appointment of February 7, 1884. Judgment was rendered in that action against the relator and in the favor of the defendant. It is now insisted that the judgment is conclusive that the appointment of Hall was for the full term of three years from February 7, 1884. It is clear that this point was not adjudicated on the face of the judgment. On the contrary, the judgment, while affirming the title of the defendant to the office, expressly declares that it was not decided, nor intended to be decided, whether he was legally chamberlain under a temporary appointment, or under an appointment for a full term of three years."

In *Converse v. Davis*, 90 *Tex.* 462, the court said:

> "While the *prima facie* effect of a general decree is to adjudicate every issue raised by the pleadings, it has never been held in any case that we are aware of that a decree adjudicates any issue which the court therein expressly excludes from its determination. The fact that it appears from the face of a decree that it did not dispose of all the issues might in some cases show that it was not final, but it could not have the effect of broadening its scope, so as to make it effective as an adjudication of the undisposed of issues."

In *Groesbeck v. Crow*, 91 *Tex.* 74, 40 *S. W.* 1028, 1029, the court says:

> "The allegations in the petition show that the issue presented therein —that is, the right of the plaintiffs in this suit to have the deed in question set aside because of the fraud committed upon them by the parties to the said transaction—was not decided by the court in that case, but that the said judgment expressly excluded that issue from the determination of the court. The judgment in the former suit under these circumstances constituted no bar to the action of plaintiffs in this case."

The two latter cases were followed in *Haralson v. St. Louis, etc. R. Co., Tex. Civ. App.*, 62 *S. W.* 788.

In *Faison v. Grandy*, 128 *N. C.* 438, 38 *S. E.* 897, 899, the court says:

"The defendants further insist that the plaintiff is estopped by the judgment rendered by Judge Boykin from claiming that the sum owing by him was less than $14,000 and interest. But in what way, we are not able to see. The judgment expressly provides that 'all the issues relating to the questions of usury have been reserved by consent, to be hereafter passed on by any referee who may be appointed to state an account in this action. * * * And W. R. Allen was appointed referee and ordered 'to pass upon the issues raised by the plea of usury, and report his findings and rulings,' etc., which he has done; and his report is here on appeal by plaintiff from the judgment rendered thereon by Judge Brown confirming the same."

In *Martin v. Turner (Ky. Ap.)*, 115 *S. W.* 833, 834, the court said:

"Preston Turner relies on the judgment rendered at the September term, 1900, in the consolidated actions then pending in bar of these actions; but that plea is not well taken, for the reason that in those cases all questions between Job Martin and Preston Turner were left open for further adjudication. The court there not having determined these matters, and having expressly reserved them, that judgment is not a bar now to their determination upon the merits."

In *Vicksburg S. P. R. R. Co. v. Tibbs*, 112 *La.* 51, 36 *Southern* 223, 224, the court said:

> "Dealing with the pleas of *res adjudicata* and estoppel, as predicted by the defendants upon the judgment in the Turner case, it will be observed that by an interlocutory ruling sustaining an objection urged by them, the judge of the Circuit Court held that the issue before the court in that case concerned only the title to the particular parcel of land occupied by Turner, and that the title to the remainder of Silver Lake Tract was not involved; and it will also be observed that in the Supreme Court of the United States the defendant asked for and obtained the same ruling, and that the final judgment of that august tribunal decides no other question than that the title to the property here in dispute was not there at issue. Under these circumstances we are unable to follow the reasoning by which the defendants endeavor to show that the judgment in the Turner case constitutes *res adjudicata* with respect to that title."

In *Baker v. Williams Banking Co.*, 42 *Ore.* 213, 70 *Pac.* 711, the principal point in issue was whether an order of a probate court was such a judgment or decree as could be relied upon as *res adjudicata*. The court held that it was such a judgment, but concludes that it was not *res adjudicata* in the particular case, the reason that

> "the order itself indicates that the court did not intend to pass upon that question, but reserved it for further consideration."

See also:

2 Black on Judgments, Sec. 616 *et sep.;*

Cox v. Von Ahlefeldt, 105 *La.* 543, 30 *Southern* 175-182;

St. Joseph Union Depot Co. v. Chicago, etc. R. Co., 89 *Fed.* 648;

Fayerweather v. Ritch, 88 *Fed.* 713.

Recurring again to the question of the conclusiveness of a mere patent issued *without a supporting record,* we find that Judge Ross in a measure followed an opinion rendered by himself in *Doe v. Waterloo Mining Co.,* 54 *Fed.* 935, but in that case there was merely an attempt to attack the *sufficiency* of the testimony on which the patent issued, and the case is radically different by reason of the fact that there was an ample record of the *ascertainment* of all jurisdictional facts necessary to justify the decision resulting in a patent, and in connection with the dual opinions of Judge Ross in this connection let us illustrate by saying: Suppose utterly without any location, discovery or assessment work, payment, application at the local land office, mineral surveys, publication, etc., and even without false testimony concerning such facts, the land department should issue to John Doe a mining patent without recitals, statement or expression, would such a patent be conclusive against a prior locator or a relocator and a conclusive source of

title? If so, the law "moves in mysterious ways its wonders to perform" and perplexes its votaries who do their best to live up to the tradition that it is fixed science. We assume that what Judge Ross meant to say was that if the ordinary course had been followed and the ordinary proofs made the judgment rendered therein culminating in the issuance of a patent would not be subject to collateral attack under allegations of falsity, for, as he said in the Doe case, "The very purpose of the patent is to do away with the necessity of *going back to the facts upon which it based.*" We have no contention with such a proposition, as in our case *"there were no facts on which the patent was based."* In fact, there is here neither a collateral nor a direct attack on the patent under the second question, but an insistence on the intent and integrity of the patent, and that it shall be given effect according to its terms; that is, *that it did not carry mineral lands but that the title to the same remained in the federal government* and this position distinguishes it from the multiplicity of cases cited by the defendants in the court below as to the conclusiveness of the patent and its immunity from collateral attack. Such an attack means where you attack and attempt to destroy, nullify or neutralize some finding of fact, some adjudication or judgment based on testimony relating to some particular fact or judgment based on the facts proven and in reality may only arise in cases

of fraud, imposition or mistake in suits instituted by some aggrieved or defrauded party in touch or in privity with the antecedent title, not necessarily the paramount title, except where the antecedent title is the paramount title. This view is evidenced by the mass of inapplicable cases cited in the court below by the demurring defendants. Take, for instance, their citation from the Kemp case (104 U. S. 646): "A patent, *in a court of law, is conclusive as to all matters properly* determinable by the land department when *its action* is within the scope of its authority; that is, when it has jurisdiction to convey the land." The department had *no* jurisdiction to convey the land unless it was *non-mineral* and if the department did *not* so determine *it follows the patent did not pass the title.* Again, the court says in the same case: "In that court *(a court of law)* the patent is unassailable for *mere errors of judgment.*" All this presupposes a "judgment," "decision," "determination" or language means nothing. This view is amplified by the further reasoning of the court in that case:

> "According to the doctrine thus expressed and cases cited in its support—*and there are none* in conflict with it—there can be no doubt the court below erred *in admitting the record of the proceedings upon which the patent* was issued in order to impeach its validity. The judgment of the department *upon their sufficiency* was not, as already seen, open to contention. If

in issuing a patent its officers took mistaken views of the law *or drew erroneous conclusions* from *the evidence,* etc., etc., *a court of law* can afford no remedy."

It will be seen that in the *Kemp case* there was a record on which the patent had issued; there had been a hearing and determination and of course it would be incompetent to attack the record, evidence given and judgment rendered therein in a *mere action of ejectment in a court of law.* The *Kemp case,* like the *Steele case,* its companion in arms, is illustrative only of the two single propositions which are not at this bar, namely: That (1) proceedings to annul or to control or charge patents with a trust for fraud, imposition or mistake cannot be maintained *in a court of law,* but (2) an injured party in privity with the antecedent title may obtain relief in *a court of equity.* Under no possible construction may they or kindred cases (and there are a hundred or more) be applied to a patent issuing without examination or determination at the instance of a party who applied for the same.

As we said in the court below, there must be *some proof, some adjudication* of the particular fact. Assume, for instance, that the department had embraced in the patent (containing no recitals) the land on which the Los Angeles federal building stands. Would the presumption arise that the land was agricultural

within the limits of the railroad grant? And this view is intensified by the defendant's citation in the court below of *Vance v. Burbank*, 101 *U. S.* 514, in which it was said:

> "*False testimony or forged documents* even, are not enough if the disputed matter *has actually been presented and considered* by the appropriate tribunal. (*U. S. v. Thockmorton*, 98 *U. S.* 61; *Marquis v. Frisbee, supra.*) The *decision* of the proper officers of the department is in the *nature* of a *judicial determination* of the matter in dispute."

Just consider that proposition. There must have been a presentation, a trial, a hearing and a determination and then it matters not (except to the government or to those in privity with the antecedent title) whether false testimony was used. No doubt about that contention; it is our contention, but the false testimony or forged document *must have been used* in the hearing, otherwise nothing was decided and the time has not arrived when nothing means any more that *nil* and *res adjudicata* may not be based on nothing.

The railroad company agrees with the government that it shall have no mineral land and that it will take excepted and reserved patents without examination of or determination of the quality of the lands and for twenty-four years stands by that agreement. Sud-

denly the mineral lands become of greater value than the entire railroad system and at once the agreement of twenty-four years is void, the exception nugatory and the lands *must* be presumed to be agricultural under a learned contention that what is not really is, and what is, as a matter of fact, really is not—that decision means no decision and no determination means that something was determined or *vice versa*; that the court must, in the face of the record of the mining locations and of the facts admitted by the demurrer, assume that the mining locations did not exist, that they were dreams or myths and that all parts of the patent that protect the immoral claims of the railroad company are valid and these parts that bear against it are void or as counsel said in the court below: "*It* (the court) *will presume, in short, any state of facts which are necessary to sustain the validity of the patent,*" and this in face of the mandatory rule laid down in the Soderburg case, 188 U. S., that the construction must be against the grantee and in favor of the United States.

Mr. Justice Van De Venter, while at circuit, had occasion to pass on the effect of a patent issued by the land office and of its force and effect as against claimants for the same land in other proceedings and in *U. S. Mining Co. v. Lawson*, 134 *Fed.* 775-6, he said:

"Whether the determination proceeded from a failure, of the then

owner's of complainant's claims to file an adverse claim or from *actual* inquiry and *decision* respecting the right of possession *is not shown,* so it cannot be said and it is not insisted that in course of the *patent* proceedings *there was an actual issue, trial or decision* respecting the order in which the conflicting claims were located or that the patenting of the areas within the overlapping boundaries were *actually* rested on privity of location.

Treating the patent proceeding as involving or as equivalent to a controversy *between* the parties or their predecessors in intent and title, the subject matter of that controversy was the surface conflict between their respective claims, while the present controversy is interlateral underground rights, not necessarily the surface conflict, which is essentially a different subject matter, and *could not* have been made the subject of an issue, trial or decision made in the *course of the patent proceeding. (Montana, etc. v. St. Louis, etc.,* 42 *C. C. A.* 415-417, 102 *Fed.* 430.)

The case is thus clearly within the rule in respect to estoppel by judgment —that where the subsequent action involves a different subject matter, the judgment in the prior action is not conclusive as to every matter which could have been offered and received to sustain or defeat the claim therein, *but only as to the matters actually litigated and determined,* * * * (citing, *amongst others, Last Chance Mining Co. v. Tyler Co.,* 157 *U. S.* 683-687), and Mr. Justice Van De Venter proceeded to say:

"The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action.

The judgment in that case (patent proceeding) is, therefore, *not* conclusive in matters *which* might have been decided, *but only as to matters which in fact were decided.*"

How were such "matters" ascertained? Only in one way—by going behind the patent and searching the record on which it was based. Judge Van De Venter then continued "the *estoppel* was sustained, but it was because of the superiority of right, asserted and upheld *in the course of the patent* proceedings had been expressly based on the single fact of privity of location. The facts were these:

"The owner of one claim applied for a patent and the owner of the other filed an adverse claim and commenced an action to determine the right of possession in the area. The judgment in that action was for plaintiff and the reason why it was held to operate as an estoppel in the subsequent action involving in a *different* subject matter is shown in the following exhibit which has reference to the former action:

"The single ground stated in the complaint upon which superiority of right is claimed is priority of location. A judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it may rest. It is doubtless true, as suggested, that, other questions may be litigated

in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. The only pleading upon which the case *passed to trial* and judgment was for the complainant, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location."

"We think," continues Judge Van De Venter, "it is manifest from the extracts quoted and from the opinion as an entirety, that the court recognized that superiority of right is not always or necessarily controlled by priority of location; *otherwise the court* could not have inquired and determined with such care whether the question of priority of location *had been in fact presented and decided in the former action* and would not have conceded that other questions might be litigated in an advense suit. *As before indicated,* it is not shown in the present case *whether there was an adverse suit,* nor if so, *what questions* were in fact *presented* and determined therein nor upon what ground the *superior right in the area* in conflict was asserted and *sustained in the patent proceedings.* The *claim of estoppel was interposed by the defendants,* and the burden was upon them *to show* the existence of every fact essential to sustain it."

All this will be remembered in connection with the opening sentence of our citation: "It is not shown, so it cannot be said, and it is not insisted *that there was* any actual issue, trial or decision * * * in the proceedings for patent." The great point in this decision is that Mr. Justice Van De Venter points out that

the rules applying to court actions in matters of *res adjudicata is equally applicable to land office patent* proceedings and thus make all our citations applicable.

In the Supreme Court, 207 U. S. 1, the judgment was affirmed where it was held:

> "(6) *Priority of right* to a single broad vein in the discoverer is not determined by the dates of the entries *or patents* of the respective claims, and priority of discovery may be shown by testimony *other than the entries and patents.*"

And this court said, (p. 17):

> "Generally speaking, if the boundary between two claims is undisputed, the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, *it is not evidence* that the right was initiated prior to the right of the patentee of adjoining ground within his claim."

We submit that natural reasoning, coupled with the foregoing decision and its citations, will establish the fact that no presumption may flow where there is no record adjudication. That the court may not say that we are estopped from saying there was no adjudication when in fact there was none and this court may not assume from the mere patent issuance, independent of its contents and lack of recitals, that there was an adjudication of all the

material facts upon which the patent must be based to be regular, when it is admitted by the demurrer and record and from the face of the patent that there are no adjudicative facts behind the record. And it is the real fact, too. *We consent now,* counsel may insert in their brief the record, examination, adjudication and determination on which the patent is based; that they bind it with (if they can find it) the Congressional Record and land office "determination" record and submit it to the court as a whole, and then a most fallacious defense, the sole defense of the mightiest grab of the public lands in the history of the republic will have gone down to defeat. Will counsel meet the fact? *No.*

Mr. Justice Van De Venter had another opportunity in *Leonard v. Lennox,* 181 *F.* 760, to pass on the question of the conclusiveness of a patent *concerning facts* and conditions *not actually* determined *in the land office patent proceeding.* In that case a patent for coal land had issued to A., and B. sought to impeach the claims of the patentee. The proof in the land office covered all requirements except as to the *non-saline* character of the land, and B. contended that for such reason the patent was *not conclusive,* and A. in reply contended that such proof was unnecessary, as the surveyor's return showed the land was not saline, and the court said, page 768:

"* * * It is next urged that in this instance compliance with the regulation (of the land department) was not necessary because the land, when surveyed, was noted upon the surveyor's *return as being agricultural in character and not saline.*

"Passing the fact that the surveyor's return, which was made fourteen years before the application, would afford no information in respect to determining discoveries, we think the contention is foreclosed by the decision in *Barden v. N. P. R. R. Co.,* 154 *U. S.* 288, where it was said: 'Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof *filed by the surveyor in the land office of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral.* But the conclusive answer to such alleged determination and report is, that the matters to which they relate *were not left to the surveyor-general.* Neither he nor any of his subordinates were authorized to *determine* finally the character of any lands granted or make *any binding* report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties; *but* they are not clothed with authority to especially examine as to these matters outside of their other duties or to determine them; *nor does* their report have any binding force. It is simply an addition made to the general information obtained from different sources on this subject.'"

And continuing, Mr. Justice Van De Venter (p. 768) said:

> *"Of the contention* that the local land officers waived compliance with the regulation by not insisting thereon it is enough to observe: First, * * * and, second, that had they been charged with the duty of passing on such applications, they could not have waived compliance with the regulation *because it had the force of law and was no less binding on them than on the applicants."*

We will show elsewhere in this brief that the railroad company *failed to comply* with the law and the regulations of the land department concerning proof of the non-mineral character of the lands in controversy, and that the rules of the land department in such instance were absolutely violated and disregarded. Counsel will not, in their answering brief, bring to the attention of this court the "record and facts decided and judgment rendered in the land office" for the very simple reason *there was no record, no facts were decided and no judgment rendered,* simply patent issuing on the railroad's application and received and accepted with full knowledge of the then agreed facts. Surely the law and the fact may not be tricked this way. If so, the law is but a puerile force in the establishment of the truth and becomes the ally of wrong and fallacy.

This rule of conclusiveness of *actually* investigated and actually decided facts and *an actual* decision on such facts is evidenced by the text of *Herman on Estoppel and Res Adjudicata* at section 441 (Vol. 1), and the controlling case of *Hosmer v. Wallace*, 47 *Cal.* 461, and others cited in the text. It is the same rule that attaches to the rulings and decisions of the secretary of the treasury, the comptroller of the currency, commissioner of pensions, etc., *which are conclusive* where all parties in interest have had notice, where there has been a jurisdictional hearing and *an actual determination of facts* and the actual rendition of a judgment thereon and the distinguishing reason of "actual decision" "of facts actually decided" run through all the decisions. (23 Cyc., p. 1223, etc.) And so this part of the suit resolves into the question, namely: Assuming the patent, discarding for the moment the question of the mineral exception, issued without any examination or decision, is attack on same limited to the United States in a direct suit? It seems to us that in such an instance the patent is simply the "legal conclusion" that without a record or an adjudicated statutory, jurisdictional fact, the land offices claimed the right, without law and in violation of law, to issue a patent for lands, worth in excess of a half a billion of dollars. Our view is supported by the

many cases we have cited and the additional authorities to be found in *Cyc., Vol.* 32, *pp.* 1021, *etc.*

A. *The decisions of the land department,* in order to be conclusive, *must be made* according to the regular rules of practice of the department *and must be based on legal evidence* or on some *formal* inquest in which there is an actual finding of fact.

Puget Mill Co. v. Brown, 54 *F.* 987.

And in *U. S. v. Coos Bay Wagonroad Co.,* 89 *F.* 151, it was held by Judge Bellinger whether lands *are within the limits or subject to the operation of a grant for* public improvements *is not a question of fact* within the rule that the judgment of the land department is final on questions of fact.

B. A decision of the land department is conclusive as to the character of the land *when that fact is actually determined.*

Wharton on Evidence, Sec. 822;
Potter v. Randolph, 126 *Cal.* 461-2;
Cragie v. Roberts, 6 *Cal. App.* 309-12, *etc.;*
U. S. v. Mackintosh, 85 *F.* 333.

C. The court will remember the application of the defendant railroad for a patent and the "proceeding" in which it issued, was purely *ex parte—there was no publication,* hearing, etc., and the rules and regulations

of the land department *were not even followed* in any particular. The patent application was made in May, 1892. The rules and regulations of the land department existing at that time provided (briefly) that there should be "posting and publication" and that a satisfactory showing as to the character of the land must be made. Nothing of this character was pursued in our instance, and for the very simple reason *there was no pretense made at the time that the land department was intending to pass on the character of the land.* Ordinarily and at that time most convincing proof was required of the agricultural character of the ground was required before the department would *actually* pass on the question and actually determine the fact. Railroad land grant companies were required to prove that *each quarter section* had been properly examined, and to furnish proper proof that each 160 *acres were free from mineral* and previous to the issuance of this patent the rule had been changed so that specific proof was required that each 40 acres was not mineral.

We are claiming under a general grant of mineral lands to citizens of the United States: the defendant railroad company is claiming under a limited subsequent grant and the land department refused or neglected to designate the quality of the land and *in violation of law and of its own rules* issued a patent bearing on its face a statement of non-determination and

yet it is contended by the patentee that the patent is false and (presumably) there must have been a determination when by its demurrer (and the fact) the defendant railroad company admits there was no determination. Thus the patentee is collaterally attacking its own patent—repudiates the same and falls back on the "issuance" as the source of all its right and title. In other words, a judgment may be an absolute nullity but the mere *clerical* entry of the judgment has a saving grace.

An isolated citation from *Davis v. Weibbold*, 139 *U. S.* 524, will not establish the proposition that the patent is of itself conclusive, that the patentee is entitled to it, on the merits or under the law that he seeks it under. The whole case should be carefully read in light of the ever present fact that the court was there considering and always referring to a *perfect patent founded on a perfect record* under a grant that *only* precluded "known" mineral lands, and at pages 523-4 (and it will be remembered that later and in the *Barden case*, 154 *U. S.* 288, Mr. Justice Fields fully explained and differentiated that case *as not applying* and as not to be used in *railroad land grant cases*), the court said:

> "* * * It is not denied that said section was returned as agricultural by the United States surveyor (not so here); that it was regularly patented to said company without fraud or mistake * * * so

far as shown by the record. The issuance of said patent was a determination by the proper tribunal that the lands covered by the patent * * * were not mineral at the date of the issuance of said patent."

But in the same case this court stated that the patent was conclusive when containing proper recitals showing a compliance with the law.

And an examination of the record shows a *perfect* record, proofs, actual finding of fact and actual decision.

In the *Barden* case Mr. Justice Fields admits that he spoke inadvertently in the *Davis-Wiebbold case* on this particular question, and both the *Deffebach-Hawke* and *Weibbold-Davis* cases need the interpretation of the *Barden* case, for in the two former but scant reference is made to the functions of a patent while the later the patent issuing under grants that precluded only *"known"* mineral land and its effect and how it should be issued are discussed at length.

In the *Weibbold-Davis case* (p. 526) the court said:

> " * * * *If the mining patent states any initiating steps in* acquiring title which antedates the title of the townsite that may *suffice in any action at law* * * * *but* in this action the patent *does not* show any initiating steps; it *merely refers* to the entry of the mining claim, and that was after

> the patent issued to the townsite. No *proof* was offered to show when the mining claim was *originally located* * * * the absence of any proceedings required by *law* to initiate a right to a mining claim, which he might perhaps have shown would have been very persuasive that no mine was known to exist."

It is clear from the text and the facts of the citation that there must be an antedecent record sufficient in its jurisdictional facts to uphold the duly recited patent. If issued in the absence of a record or without recital of jurisdictional facts the patent is of no moment, and in the *Deffebach-Hawke* and *Weibbold-Davis* cases the court *went behind* the patent to find a supporting record. In our case it will be conceded by us that certificates were returned by public officers to the effect the records of their respective offices showed no adverse claim of record and that the land had not been returned denominated as mineral (or other) land, but there was no *certificate* as in the *Howard-Perrin case*, 200 *U. S., p. 72, "that the land is non-mineral in character,"* a marked distinction, as one is the finding of a fact while the other is that the record books mention not the subject. Under section 891, *R. S.*, the certificates would have been competent but not necessarily material.

In *Doe v. Mahana*, 21 (*U. S.*) 276, it was held it was for the jury to say whether the secretary of the interior *had actually* decided to select *and had* selected certain land for the use of schools, the case showing the necessity of final and actual decision on the part of the secretary, and a ruling along the similar line of actuality will be found in *Hedrick v. Hughes*, 15 *Wall.* 123, and *Johanson v. Washington*, 190 *U. S.* 179, all cases of collateral attack.

There is certainly no greater sanctity surrounding the land department than surrounds the circuit courts of the United States, and it cannot be maintained that a non-adjudicated fact will be presumed to have been adjudicated *simply because judgment enters.*

The rule as pointed out by Mr. Justice Van De Venter *(supra)* is analogous, namely, what is adjudicated is conclusive; non-adjudicated questions create no bar to subsequent attack. In other words, the *"decisions"* of the land department are final to the same extent that those of other judicial or *quasi* judicial tribunals are, *what has been adjudicated* as a fact is binding. Whether or not the land was mineral *was a question depending on parol testimony.* (*Johnson v. Drew*, 171 *U. S.* 99). How could the fact be established except by testimony? None was offered and no finding was made, and it is just in the condition of *Burfenning*

case, 163 *U. S.* 321, where the court said the question of mineral character of the land *did not rest on the record, but was dependent on oral testimony*, and after such testimony the finding of the department one way or the other on that question would be conclusive, and it necessarily follows that the converse of the proposition would be true.

United States v. C. M. & St. P. R. 218 *U. S.* 242-3.

The case shows that an *"actual decision"* is contemplated; not a mere issuance of a piece of paper analogous to a writ of assistance, which writ, *unless predicated* on an *actual* judgment, would be of no avail.

U. S. v. Rizzinelli, 182 *F.* 675;
Teller v. U. S., 113 *F.* 273;
Jeffords v. Hine, 15 *Morrison Min. Rep.* 579;
Baldwin v. Stark, 107 *U. S.* 463;
Lee v. Johnson, 116 *U. S.* 48;
Dargin v. Koch, 20 *L. D.* 384;
Shepley v. Cowan, 91 *U. S.*, *pp.* 339-340.

That the patent must state the finding or the record show it is pointed out in *Eureka Co. v. Richmond Co.*, 4 *Sawy*, (*C. C. D. N.*) 302, when Field, J., said:

> "If the date of such location *be stated in the patent, or appear* from the record in the local land office, the patent will take effect from that date. It is only

where an adverse party was required to *adverse* and fails that the theory of presumption of regularity arises, and when *no opportunity is presented to adverse the rule necessarily fails.*"

In the *Kemp case,* 104 *U. S.* 636, the court, discussing a perfect patent founded on a perfect record, where the officers, upon evidence, rendered a judgment and *not merely issued an execution without a judgment,* as in our case, and in the *Steele case,* 106 *U. S.* 447, there was admittedly a precedent *finding of facts* on which the patent was based and the ejectment suit was predicated on the proposition that the *testimony* on *which* the *specific* finding of fact was made, *was false* and the decision of the Supreme Court simply was that the validity of a patent could not in this manner be assailed collaterally in an action of ejectment any more than could a *judgment obtained by false testimony.* We admit it, but can a judgment of a court be held conclusive in a suit in equity when it is admitted that a fact in controversy was not passed on or adjudicated in an action in which the judgment issued?

Mr. Justice Fields expressly said in the Steele case *"that the patent is the result of the judgment,"* thus doing away with the repeated protestation of counsel that "the patent is the decision" or "the patent is the judg-

ment." A judgment issued in a suit absolutely without any testimony would not be conclusive except to this extent, namely, that while the judgment would not be void it would not constitute an estoppel as to facts not appearing by way of recital in the judgment, but even this rule would not apply to us as there was no judgment rendered in the land office *and the patent is neither a decision nor a judgment. A patent is simply a quitclaim deed* and it is everywhere the rule that a quitclaim deed puts a man on his inquiry (85 Cal. 458-9) and it is conclusive only to the extent that it conforms to the judgment *of which it is the result* and that authorized its issuance, and if the ruling of the commissioner of the general land office directing that the *excepted* patent issue was made on the unproven allegations of the defendant railroad company, with the mineral exception in it, then a question of law was passed on and *not a question of fact.* And such a ruling is subject to review.

A patent is nothing more than a deed (43 Iowa 11; 188 U. S. 432; 10 F. 785; 132 U. S. 239; 136 Pa. St. 541-552; 70 U. S. 478).

In the much cited (by counsel) case of *U. S. v. Winona, 67 F.,* at pp. 955-6, we find the court saying:

> "When a claim under a grant for a railroad company is made to a portion of the public lands under its control

the tribunal must *determine* whether or not it has complied, etc., etc. In every case there must, in the nature of things, *be a decision of questions of fact and questions of law,* because in every case the ultimate question is * * * A patent is the *record evidence* of *the judgment of the tribunal.*"

This court, however, said that the patent is the result of the judgment and not the judgment as some inferior courts have stated.

But this observation was made in an instance where there was a record and decision and a patent with full recitals. Let us illustrate: A. commences an action against B. to quiet title: there is no contest, hearing, evidence, findings of fact or judgment, but the clerk issues his deed to B. (as he has a right to do under certain circumstances). Will it be contended that the deed passed the title of A. to B. or that A. was bound by it?

It has never been held that a patent containing no recitals, and issued without findings of fact, was conclusive. All the cases hold there must be a decision, a right or wrong decision, based on findings of fact. In the *Winona case* the land had been certified for patent and the trial court held that the particular certificates found in that case *were evidence* that the grants to the railroad company had attached to the lands in controversy and that the certificate

was the equivalent of a patent and that a patent issued *within* the jurisdiction of the land department is an adjudication that the patentee *is entitled to land under* the laws of the United States and is a conveyance and not subject to attack collaterally. (Page 955.)

The case is better reported in 165 U. S. 463, where it appears (p. 464) *that on* proceedings in the land office, *after* proper *notice by publication, all prior entries were cancelled prior* to the certification, etc., and *on an agreed* state of facts that no adverse claims had ever been made according to the records, etc., and the railroad *afterwards* sold the land to innocent purchasers and that it was *not* contended that the lands altogether received by the railroad company *exceeded the grant!* And that it was not contended the railroad company received more lands that it was ENTITLED to receive, but that the lands in controversy were improperly certified. Then on page 465 the *government counsel practically stipulated away their entire case,* but even then the judgment of the court below was *only saved* by further stipulating away the effect of the *Dunmeyer case* (p. 473), and on that sole and express ground the Supreme Court said it would save the *innocent purchasers* by applying to the case a law by way of laches *not* then yet in force! For the court said:

> "If these two sections (the subject-matter of which was relied on in the court below and on which its ruling was based) were *all the legislation* of congress bearing on the subject *it might be difficult to sustain* the judgment of the lower courts *or to deny* the relief sought by the government, for, by the construction *placed* on railroad grants in *K. P. R. Co. v. Dunmeyer* (113 U. S. 629), *these lands did not pass under the railroad grants.*"

And the court saved the innocent purchasers by giving them the benefit of the Act of March 2d, 1896, *but the Supreme Court expressly repudiated* the holding of the court below *that the patents were conclusive or binding* on any of the grounds stated by the trial court in its opinion, and even despite the government's stipulations it held the patents were void, but that in view of the statute of limitations about to become effective the federal action could not be maintained, and we cannot understand why counsel cited the case decided in the lower court, or, having done so, they failed to point out that all the material holdings of that case had been destroyed by the Supreme Court.

It is true Judge Sanborn frequently referred to it in his subsequent decisions, and in *King v. McAndrews*, 111 *F.* 864, *supra*, he says the test of jurisdiction is the right to enter upon the inquiry *and to make some decision*, and the learned judge added:

> "Hence, a patent, evidencing an *erroneous decision of a question of law* or a mistaken determination of a question of fact, which the department was vested with power and charged with the duty to decide, is as impervious to collateral attack as one which is the result of correct conclusions."

Of course the patent issued by reason of the erroneous conclusion of law might be reached by direct attack, but it is equally plain that if it issued in violation of law as the result of an erroneous legal conclusion the patent would be void and subject to collateral attack even by a subsequent claimant. All the Sanborn decisions are differentiated in 173 *F. at page* 898, where the court said, on appeal, that a patent is like a sheriff's deed *after judgment* and execution (Stewart v. McHarry, 159 U. S. 643.) Suppose a sheriff should issue deed for the Southern Pacific Building in San Francisco to this appellant, a deed without a judgment or record or recitals? Would it be conclusive?

Judge Sanborn at *page* 863 *(King v. McAndrews, 111 F.)* says that his decisions in *U. S. v. N. P. R. R. Co., 95 F. 864-870, and in the Winona case, 67 F. 948,* were affirmed in the U. S. Supreme Court *without* any criticism of his views, and that thereby it may be safely assumed that his views received the approval of the Supreme Court. As we have point-

ed out the affirmance of *Winona case* was based entirely on a question that was not even suggested by or before Judge Sanborn, and the case thereby saved.

In the other case, as Judge Sanborn expressly said (p. 870), the question was, Did the department have jurisdiction to issue the patent and determine the questions *which conditioned* its issue and whether a patent was void because it was induced by error, fraud or mistake of fact," and when the case reached the United States Supreme Court it was affirmed on the ground *only* that the non-completion of the road within the time limited did not *ipso facto* forfeit the grant, but in neither of the cases was there one single sentence of which it may be said upheld the proposition of Judge Sanborn that the patent *is a judgment of the land department,* while the Winona case, if it held anything on the subject, *held it was not,* and nowhere did those cases hold that a ruling on a question of law was as binding as a finding on a question of fact, and in the *Colburn case,* 164 *U. S., pp.* 385-6, *this court said:*

> "A motion is made to dismiss for lack of a federal question. The contention is that the defendant disclosed in its answer a *decision of the land department* * * * ; that having pleaded this decision of the land department, that decision is final and conclusive *until* set aside in a direct pro-

ceeding instituted for that purpose. *This motion must be overruled.* The answer of the company alleged the congressional land grant, and the fact and circumstances which under that grant created, as claimed, a title to the land. It is true he also set up certain proceedings in the land department, but that was by way of answer to the allegations in the complaint of a *decision by that department* claimed by the plaintiff to be controlling, and *disclosed in detail the facts* upon which that *decision* was based and the terms *of the decision itself*, in order to show that such decision was *ineffective* to disturb the title which it took by virtue of the land grant and the proceedings had thereunder. * * * On the merits of the case it may be observed that the burden of the decision of the Supreme Court of the state is that because the land department *had decided adversely* to the claim of the railroad company and because no direct proceedings had been had to set aside that decision, it *was conclusive* against the company. In this we think the learned court *erred.* * * * *Now, in this case the allegations are that Kelly never made any entry in the local land office,* and the *decision* of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the *decision* of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim *exempting the land from the operation of the land grant,* is a decision on a matter of law which *does not* conclude the parties and which is open to review in the courts. In this connection it may be borne in mind that the act of congress operated to pass the fee, and this independently of the issue of a

patent, * * * so that the case presented is of a *mere* decision of the secretary of the interior that the plaintiff was entitled to a patent and not that a patent already issued. *Though* a patent had been issued, *it would not follow* that it is conclusive, even in an *action at law*, and that in all cases *some direct* proceeding to set aside the patent is necessary. * * * For the reasons above indicated, because the decision of the land department was *only* on matters of fact and did not conclude the law of the case, *and because* such facts *so found were not of themselves sufficient* to disturb the title of the railroad company, the judgment is reversed, etc."

And in *Hawley v. Diller*, 178 U. S. 489-90, the same rule was expressed.

In view of these decisions we are, we think, justified in claiming that the oft relied, oft repeated proposition of Judge Sanborn that errors of law or rulings of law based on *insufficient* facts could only be reversed in a direct attack, and that the patent is the decision, adjudication and judgment of the land office is erroneous. As a matter of fact this suit, taken as a whole is a direct attack, except in the instance of the allegations relating to the mineral exception and this appellant being in privity with the paramount title *can maintain all or any* actions that could be maintained by the United States under the true rule announced in *Mery v. Brodt*, 121 *Cal.* 335.

In answer to our argument under this point counsel in the courts below contended:

> "If through fraud or mistake the government issues to a railroad company a patent for land which was known to be mineral at the time the patent issued, only the government or those who were in privity with the government at the time such fraud was practiced or mistake committed can be heard to complain thereof"

and therewith cited the following cases, namely,

Smelting Co. v. Kemp, 104 *U. S.* 639;
Steel v. Smelting Co., 106 *U. S.* 447;
Hartman v. Warren, 75 *Fed.* 157;
Deweese v. Reinhard, 61 *Fed.* 777;
Carter v. Thompson, 65 *Fed.* 329;
Jameson v. James, 155 *Cal.* 275;
Peabody Gold Mining Co. v. Gold Hill Mining Co., 111 *Fed.* 817;
Bear v. Luce, *Fed. Case No.* 1179;
New Dunderberg Min. Co. v. Old, 79 *Fed.* 598;
Neilson v. Champagne Mining Co., 119 *Fed.* 123;
Oregon Trunk Line v. Deschutes R. Co., 172 *Fed.* 738;
Lee v. Johnson, 116 *U. S.* 48, 53;
Sparks v. Pierce, 115 *U. S.* 408;
Meader v. Norton, 11 *Wall.* 442, 458;
Johnson v. Towsley, 13 *Wall.* 72;
Silver v. Ladd, 7 *Wall.* 219, 228;

Warren v. Van Brunt, 19 *Wall.* 646;
Moore v. Robbins, 6 *Otte* 530, 539;
Shepley v. Cowan, 1 *Otte* 336-340;
Marquez v. Frisbie, 101 *U. S.* 473-479;
Bohall v. Dilla, 114 *U. S.* 47-51;
Maxwell Land Grant Case, 121 *U. S.* 380-381;
Knight v. U. S. Land Asso., 142 *U. S.* 161-216;
Monroe Cattle Co. v. Becker, 147 *U. S.* 47-59;
In re Emblen, 161 *U. S.* 52-57;
Duluth, etc. v. Roy, 173 *U. S.* 587;
Emblen v. Lincoln Land Co., 184 *U. S.* 660-664;
Manning v. San Jacinto Tin Co., 9 *Fed.* 727-735;
Scott v. Lockey Investment Co., 60 *Fed.* 34-37;
Campbell v. Weyerhaeuser, 161 *Fed.* 332-334;
Am. & Eng. Ency. of Law, (2d Ed.) *Vol.* 26, *p.* 401.

The answer is simply, that each of the cases were instances of a voidable patent *issued within* the *jurisdiction* of the land department. There is not within the lengthy list an instance of *a void patent;* there could be no instance of a void patent as in such instance the ac-

tion provided for in cases of fraud, imposition and mistake would not be and such action could only lie in instances of *voidable patents issued within the jurisdiction of the land department*, and all the patents were issued on a jurisdictional record.

In cases of void patents the same may be impeached in any form of action where they are offered as the base of the attack or defense.

Williams v. San Pedro, 153 *Cal.* 44.

> "On the other hand a patent may be collaterally impeached *in any action* and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, etc."
>
> *Kemp v. Smelting Co.*, 104 *U. S.* 636.

And again this court in *Steele v. Smelting Co.*, 106 *U. S.* 447,

> "if the lands purported to have been conveyed by patent were the property of the United * * * or reserved from sale, the patent would be *inoperative* to pass the title and objection could be taken to it *at any time and in any form of action.*"

In connection with these points and cases the court will remember that at the time of patent it was not within the power of the United States to convey the land; that the United States was holding the paramount title to the controverted land in trust for the min-

ing locators who had taken up the land under the mining laws of the United States previous to the railroad applications for patent and that such outstanding title remained in the locators down to the moment of forfeiture and relocation.

It was a favorite argument with counsel in the courts below that the patent having issued all antecedent adverse claims which might have prevented the issuance of the patent will be presumed not to have existed.

That the patent having issued this court will presume that there was no Coalinga mining district, that no valid antecedent mining locations had been made or having been made they had been abandoned, etc., etc.

Elsewhere and in the same connection they contended that certification of the selected lists for patent was a conclusive adjudication that carried all of the foregoing presumptions and at all times they contended that the act of certification was the legal equivalent of the issuance of patent.

The exact question arose in Bridgman v. Weeks, 159 *U. S.* 541, and therein was decided adversely to the now claims of the defendant railroad company.

In that case there had been a certification pursuant to the act of congress of March 3, 1857, granting certain lands to the territory of Minnesota for the construction of

railroads in alternate sections not otherwise appropriated or to which rights of pre-emption had not attached, etc.

Prior to the filing of the map of the definite location by the railroad company a pre-emption application was made to the local land office but rejected and later the lands were certified and subsequently the title passed to the railroad company from the territory of Minnesota under the certification of the general land office. Later a patent issued to the pre-emptor in the usual form except that it was stated therein that the land had been certified to the state of Minnesota for railroad purposes by mistake and the successor of the pre-emptor instituted his action of ejectment against the grantee of the railroad company and ultimately the case reached this court where it was strenuously contended that the secretary of the interior had included the section in controversy in the list of lands certified to the state of Minnesota as part of the lands granted by the act of March 3, 1857, and that such certification was an adjudication that the land in question had not been precisely disposed of and that no pre-emption right had attached thereto and passed the legal title to the lands notwithstanding whatever the pre-emptor's equitable right might be; and *that while certification might be voidable it was not void.*

And the contention did not prevail; this court tersely stating that the certification was void and did not carry the presumptions contended for by the grantee of the railroad company that no antecedent pre-emption right had attached to the land.

Mr. Justice Van De Venter, then assistant attorney general of the United States, had occasion to construe the ruling of this court in that decision and suggested that the land department had the right to ignore patents illegally issued and to proceed on the theory that none had been issued, and, if this be so it naturally appears that the patent in controversy being absolutely void, the title to lands in controversy remaining in the United States; that the same are within the jurisdiction of the land department and it has never been apparent to the writer of this brief that the land department could lose its jurisdiction over the lands in controversy if the legal title to the same remained in the United States under the mineral exception and we suggest that there is no authority for the proposition that the land department does not retain jurisdiction over public lands in cases where patents have been illegally issued, that is in instances where the land department had not the jurisdiction to issue a controverted patent.

In many instances the land department have issued one, two or more

patents for the same piece of land and in many of those instances it was held that the second or even the third patent prevailed in actions at law and in equity and against the antecedent title and it naturally follows that in an action at law where the plaintiff was the owner of the second patent that he could not prevail except by showing a legal title and if the courts in those cases held that the second patent was a legal title it naturally follows that the land department had jurisdiction over the land sufficient to pass a legal title notwithstanding it had prior thereto apparently lost all jurisdiction over the lands on the issuance of the first patent.

LeRoy v. Jameson, 3 *Swing*, 369.

Counsel for the defendants tried to bolster their contention in that the patent created the presumption *that no prior mining claims existed* by citing and relying on (and misinterpreting) the following cases (1) *Scott v. Lockey*, 60 *F.* 34; (2) *Carter v. Thompson*, 65 *F.* 329; *Buena Vista, etc. v. Tulare, etc.*, 67 *F.* 226; (3) *U. S. v. Winona etc.*, 67 *Fed.* 948-975, generally, and (4) specially, *Lange v. Robinson*, 148 *F.* 803, that a valid subsisting mining claim was not sufficient to take land out of the catagory of agricultural land and stamp it as mineral land.

Taking up the *Winona* case first, we find that counsel contended that the

holding of the case was that a certification (equivalent to a patent) established the conclusive contention that there were no homestead or pre-emption claims on the land at the time of definite location. Conceding that Judge Sanborn held so at circuit the fact remains that such a holding was explicitly disapproved in *Bridgeman v. Weeks* (*supra*) and the further fact remains that when the case reached this court it was explicitly stated (165 U. S. 463) that on proceedings in the land office, after proper notice by publication, *all prior* entries were cancelled *prior* to certification and even then this court could only save the case by applying to it the federal statute of limitations of March 2, 1896, and this court at page 473 said:

> "If these two sections were all the legislation of congress having on the subject it might be difficult to sustain the judgment of the lower courts or to deny the relief sought by the government, for, by the construction placed on railroad grants in *R. R. Co. v. Dunmeyer*, 113 *U. S.* 629, lands did not pass under the railroad grants, etc."

and similar ruling, as stated in Bridgeman v. Weeks (*supra*) were made by this court in

Hastings etc. v. Whitney, 132 *U. S.* 357;
Bardon v. N. P. R. R. Co., 145 *U. S.* 535;
Art v. Brandon, 156 *U. S.* 537;
Whitney v. Taylor, 158 *U. S.* 85.

Counsel was unable to cite a single decision of this court where it was held that *certification or patent* would create, of itself, the conclusive presumption that no prior claims of pre-emption or homestead or mining locations existed or that this court would presume, in presence of the undisputed facts, by mere certification or patent that the lands were "not reserved, sold, granted or otherwise appropriated, and free from pre-emption *or other claims* or rights."

Counsel contended, apparently, that "not reserved" referred to special reservations such as designated military or Indian reservations. In other words, counsel contended that while the land department was without jurisdiction to patent a few acres embraced in some lighthouse reservation, it had a perfect right to patent 200,000 acres of *known* mineral lands of enormous value because the particular acres covered by valid subsisting recorded mining locations had not, prior thereto, been specially reserved in some particular act of congress; that while congress had said *all mineral lands* were reserved they were not reserved because congress had not said that the N. W. ¼ of the S. E. ¼ of some section being mineral land could not pass under a railroad grant, and to uphold this remarkable proposition they cited the uncited case of *Scott v. Lockey*, 60

F. 34, which, while greatly relied on and much exploited by counsel, is absolutely in our favor as a converse proposition.

In *Doolan v. Carr*, 125 *U. S.* 618-642, the United States had issued a patent under a railroad land grant and *subsequently* the defendant made an entry on the land and in an action of ejectment brought against him by the grantee of the patentee this court held that the patent was not conclusive in any form of action and created no presumption of regularity in its issuance, etc.

At page 627 this court said (*citing Wilcox v. Jackson*, 38 *U. S.* 509):

> "In the opinion of the Supreme Court on this subject the language used in *Elliot v. Peirsol*, 26 *U. S.* 340, is quoted with approval:
>
> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every court. But if it acts without authority its judgments and orders are nullities. They are not voidable, *but simply void.*"
>
> "The court then proceeds: 'Now to apply this: Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year because these questions are directly submitted to them; yet if

> they undertake to grant pre-emptions in lands in which the *law* declares that they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction, as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum.'"

and this court then cited the mining case of *Reynolds v. Iron Silver Mining Co.*, 116 *U. S.* 687, showing that lodes in placer claims were reserved from patent under the placer mining law, which is a case of a *general and not a special reservation*, and then passing to the question of general reservations as distinguished from special reservations, this court at *pp.* 630-31 said:

> "This court held (in a railroad land grant case) that, notwithstanding the generality of the granting clause, it was not intended by that statute to grant anything but *public* lands of the United States. * * * 'A *special exception of this land was not necessary* in these grants because the policy which dictated them confined them to land which congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. *The legislation which reserved them for any purpose excluded it from disposal* as the public lands are usually disposed.'"

And at page 632 this court said:

> "It will be seen that this is the precise question presented in the case under consideration and (this) court,

> referring to the preceding case of Leavensworth, etc. v. U. S. (92 U. S. 733) and reciting the fact that in that case they confined a grant of every alternate section of "land" to such whereto the *complete title was absolutely vested in the United States,"*

and it must be apparent to this court that the "general reservation of mineral lands, known and unknown," has been sufficient to prevent mineral lands from passing under the various railroad land and school land grants. This court held in Doolan v. Carr that Mexican grants were "claims" or "rights" that could not pass under a railroad grant even if *patented* to the railroad grantee and though they were often indefinite in character. The dissenting opinion of Mr. Chief Justice Waite in *Doolan v. Carr* presents exactly the same argument *mutalis mutandis* as was advanced by counsel in the courts below, namely, that it mattered not whether the patent was voidable or unvoidable only an *antecedent* title could attack it and that view was set aside by this court in *Doolan v. Carr*, but counsel kept on reiterating it.

Counsel also attempted to thrust us into the catagory of cases akin to *Moffat v. U. S.* 112 *U. S.* 24, and *U. S. v. Minor*, 114 *U. S.* 241, "where it was said by this court, in the *Minor* case:

"When the patent is the result of nothing but fraud and perjury, it is enough to hold *that it conveys the legal title.*"

We make no charge of fraud or perjury except in so far as the Madden application is concerned nor are we attacking *any judgment* secured through fraud and perjury. The fraud spoken of or the perjury that might have occurred in a proceeding in the land office on the railroad application for patent would have been a legal justification for the issuance of a patent that would have carried the legal title, that could only be cancelled in a direct suit by the United States and if there had been fraud and perjury that resulted in a decision that the land was non-mineral and if the patent or certification for patent had issued as the result thereof *we would not be here contesting* with the railroad company as we would have no legal ground to stand on, because no patent is *void* that issues through fraud or perjury or imposition or mistake. In such instances a patent is only voidable but such question is not here.

The Madden application is not under consideration here as no question particularly affecting it has been certified to this court. The allegation in the bill concerning the Madden application and its falsity particularly referred to the questions whether the controverted

lands were coterminous to a completed twenty-five mile section of railroad.

No special demurrer or motion to strike was presented at circuit and that questions were not certified to this court and will not be argued here except in the incidental proposition that it being admitted by the demurrer and by the record that the lands not being coterminous to a completed twenty-five mile section, the land department violated its rules and the law in issuing the patent in controversy on the *ex parte* application of the defendant railroad company.

The Madden application on its face was not sufficient to vest the land department with jurisdiction. Mr. Madden simply said the lands applied for were not "*interdicted* ~~dicted~~ *mineral lands.*" He made no statement that the lands were not mineral lands, but simply stated they were not "interdicted" mineral lands; he did not allege that the lands sought to be patented were opposite a completed section of twenty-five miles and he sought the patent because, as he alleged *forty* miles of road had been completed—that is a full section of twenty-five miles plus a stub of fifteen miles, and our contention was that for the uncompleted section of fifteen miles the railroad company could not receive a patent for land coterminous, that is the defendant railroad company was not entitled under the grant to lands until a full section of twenty-five miles of road had

been completed, and in this instance the lands in controversy were coterminous not with a completed section but with a stub of *fifteen* miles which fact is set forth in the Madden application and for which reason it was so pleaded. It will be noted the land department made *no finding* as to the Madden statement of construction or quality of the land as the patent simply recites the construction of *two hundred and fifty-two miles* on nine 25-mile sections plus 2 miles.

The third question certified to this court reads:

"IS THE RESERVATION AND EXCEPTION CONTAINED IN THE GRANT IN THE PATENT TO THE SOUTHERN PACIFIC RAILROAD COMPANY VOID AND OF NO EFFECT?

The first provision in the grant excludes "all mineral lands." The grant (Act of July 26, 1866, Sec. 3) reads: "That all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated *agricultural* lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

The other provision is: "That the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

The same intent and purpose is carried in the joint resolution of *June* 28, 1870.

The effect of the first of these provisions is to entirely exclude mineral lands from those which may be granted under the act, and to make their grant in aid of railroad construction *ultra vires* and illegal.

A-2. The only effect of the other proviso is to define and restrict the otherwise broader meaning of the word "mineral" and so that when used in that act, it shall not include coal or iron, and so that lands containing coal or iron may be granted under that act and are not excluded therefrom as mineral lands. *In other words, coal and iron lands are not mineral lands within the purview of that act.* This is the sole and entire effect of that proviso.

Now, in a suit to quiet title because the lands were mineral lands, all that it is necessary to aver, in order to bring the patent within this prohibition of the act, is that the lands were mineral lands; and it would be improper as well as necessary to aver that they were mineral lands other than for coal or iron, for coal and iron lands are not mineral lands within the provisos of that act.

It is important to observe that this act does not exclude certain or some mineral lands from those which may be

granted and permit the grant of other mineral lands. On the contrary, it plainly and emphatically prohibits the grant of any and every kind of mineral land, and then defines what are, or rather what are not mineral lands.

The distinction is as obvious as it is important. In the first case, if some mineral lands were excluded and others were not, then the averment in the bill that they were mineral lands would not necessarily mean that they were of the kind precluded from the grant. But when all mineral lands are excluded from the grant, and the act says that coal or iron lands are not to be considered as mineral lands, then the averment that the lands in question were mineral lands is unnecessarily an averment that they were within the prohibition of the act. There is, absolutely, no escape from this. When the act says that mineral lands shall not be granted and that coal or iron lands are not mineral lands, then the averment that they were mineral lands within the meaning of the act which is considered. And to go further and say that they were not something else which the law says are not mineral lands would be as improper as unnecessary.

This is conclusive of the question; but it far from being all that there is in this direction.

The manifest gravemen of the whole of this part of the bill is that the defendant illegally procured a patent for lands which were mineral lands within the preclusion of this act; and not at all that such patent was for lands which the act authorized. When a pleader avers as his cause of action that the defendant fraudulently or illegally procured a patent for mineral lands in violation of that act *and which there was no lawful power to grant,* it must, by every fair rule of construction, be taken to mean and intend such lands as were mineral lands under that act, and not lands which the statute said were not mineral; and when the act forbids the grant of any mineral lands in aid of railroad construction and the averment is the grant of mineral lands, this is necessarily sufficient.

A-3. That the exception of *known and unknown* mineral lands in the grant was legal needs no discussion. It has never been contended otherwise since the decision of this court in the *Barden* case and it is the settled law of this country.

The exception in the patent reads:

"YET EXCLUDING AND EXCEPTING 'ALL MINERAL LANDS' SHOULD ANY BE FOUND IN THE TRACTS AFORESAID, BUT THIS EXCLUSION AND EXCEPTION ACCORDING TO THE TERMS OF THE STATUTE SHALL NOT BE CONSTRUED TO INCLUDE COAL AND IRON LANDS."

The certificate of the commissioner of the general land directing the issue of the patent in controversy reads:

"It is hereby recommended that the tracts described (in said list) covering 440,900,85 acres, be approved and carried into patent as the lands falling within the grant aforesaid to said Southern Pacific Railroad Company of California, *excluding, however, from the approval and from the transfer in the patent* —that may be issued *"All mineral lands" should any such be found* in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron." [Appendix, p. ——]

The certificate plainly shows that the land department *never* approved the list of selected lands, never determined the quality of the land and never rendered any decision concerning the quality of the land, but *expressly* and pursuant to the granting acts, *ex-*

cluded from approval and *transfer* any *lands found to be mineral.* That was the only "judgment, determination or decision" ever made by the land department concerning the land in controversy.

The list was simply passed up to the commissioner of the general land office with certificates of his subordinates that the records of the land office showed no mineral claims existing in the land department concerning the selected list of nearly half of a million of acres. It was a purely formal act following the construction of the granting act that an excepted patent of unexamined and undetermined lands might issue carrying the mineral exception.

It was not compulsory for the grantee to accept the patent but the grantee did accept it, did record it and stood by silent under its provisions, terms and conditions for upwards of twenty-five years.

The entire "record" from the application of the Southern Pacific Railroad Company down to the issuance of the patent will be found in the appendix, marked Exhibit E. A-4. Examination of the record will disclose there was *absolutely* no examination concerning or any decision deciding the quality of the land; the various officers of the local and general land offices simply certifying that the books of their respective land officers

showed no mineral or swamp claim attaching to the lands described in the lists.

It is apparent from both the certificate directing the issue of the patent and from the face of the patent that the patent issued without examination of or decision concerning the quality of the land. Many years ago the Supreme Court of the state of California had occasion to call attention to the fact that the insertion of the mineral exception in a patent was notice to a railroad patentee that there had not been the examination required by law and in that case (*Gale v. Best*, 78 *Cal.* 240-1) the court said:

> "AND IT MIGHT STRONGLY BE ARGUED THAT SUCH CASE (EXCEPTED PATENT) ALTHOUGH IT WAS THE DUTY OF THE LAND DEPARTMENT TO DETERMINE THE CHARACTER OF THE LAND BEFORE THE ISSUANCE OF THE PATENT, YET AS THE PATENT SHOWS UPON ITS FACE THAT SUCH DUTY WAS NOT PERFORMED, THE PATENTEE MUST BE HELD TO HAVE TAKEN IT KNOWING ITS UNCERTAIN AND UNSTABLE CHARACTER."

About the time Judge Ross decided adversely to us, at circuit, a similar suit, between other parties, was decided by Judge Bean in the Oregon circuit and he decided favorably to our contention. (*Eastern Oregon Land Co. v. W. R. L. & I. Co.*, 186 *Fed.* —) Judge Bean said:

"COMPLAINANT INSISTS, HOWEVER, THAT THE ISSUANCE OF PATENT BY THE GOVERNMENT OF THE UNITED STATES TO ITS PREDECESSOR IN INTEREST IS A CONCLUSIVE ADJUDICATION THAT THE LANDS DESCRIBED THEREIN ARE NON-MINERAL. THAT WOULD PROBABLY BE TRUE IF THE PATENT CONTAINED NO RESERVATION (BARDEN V. N. P. R. R., 154 U. S. 288) BUT IT CONTAINS A CLAUSE "EXCLUDING AND EXCEPTING ALL MINERAL LAND SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID." THIS MANIFESTS AN UNMISTAKABLE INTENTION ON PART OF THE GOVERNMENT NOT TO CONVEY MINERAL LANDS AND REPELS ANY INFERENCE THAT THE DEPARTMENT ADJUDICATED OR INTENDED TO ADJUDICATE THAT NO PART OF THE LAND DESCRIBED IN THE PATENT WAS MINERAL."

Judge Ross had an opportunity to neutralize, if he could, the opinion of Judge Bean, as it was brought to his attention but he did not even refer to it in his opinion. This view of Judge Bean and of Judge McFarland in the Gale-Best case is intensified by comparing with the exception in the patent the certificate of the land office under which the excepted patent issued.

For forty years it had been the practice and the custom of the land department to insert the mineral exception in patents and as early as 1874 patents issuing under the Act of July 27, 1866, were returned by Sec-

retary of the Interior Noble with directions to insert the mineral exceptions.

Atlantic and Pacific R. R. Co., 12 *L. D.* 116.

The opinion in that land office decision was written by John W. Noble, a very great lawyer, and whose opinion concerning the *Weibbold-Davis* and *Deffebach-Hawke* cases was followed to the letter by this court in the *Barden case.*

At an early day the California courts began to pass on the question and there has never been any difference of opinion in the state court concerning the validity of such a mineral exception.

The discussion first arose in *Alford v. Barnum*, 45 *Cal.* 482.

The land was within the grant to the C. P. R. R. Co., and the company had received a patent for it, which patent "*excepted from its operation all mineral lands.*" The question at the trial turned on the question of the relative value of the property for mining or agricultural purposes, and the court and everyone concerned conceded the validity of the mineral exception.

Cited to same effect in *Merrill v. Dixon*, 15 *Nev.* 407; *Davis v. Weibbold*, 139 *U. S.* 519, discussing townsite

entries, and the court *recites the inclusion* of the mineral exceptions in the patent. On examination of *Davis v. Weibbold* it will be found that the court, applying the *Alford-Burnum* citation, refers to the mineral exception as being contained in the patent, and the confusion resulting from the *Deffebach-Hawke* and *Weibbold-Davis* cases is cleared away in *Barden v. N. P. R. R. Co.*, 154 *U. S.* 288, where the cases are distinguished *as not applying to grants* excluding *"unknown"* mineral lands, like railroad grants.

U. S. v. C. R. R. Co., 93 *F.* 873.

The particular value of this authority is that the case was litigated about the mineral exception; *that was* the base of the case and under the exception evidence of the mineral quality of the land was admitted, and the further importance of the authority is that under the mineral exception in that case a patent to the railroad company for known mineral lands was cancelled.

In *McLaughlin v. Powell*, 50 *Cal.* 64, it was held:

> "3. The question not decided whether plaintiff in ejectment, who relies on a patent to W. P. R. R. Co., must prove that the demanded premises are not mineral lands or are not within the exceptions contained in the grant.
>
> "4. If the plaintiff in ejectment relies on a patent to W. P. R. R.

Co. for land granted to aid in the construction of its railroad, which patent *excepts from the transfer all mineral lands,* the defendant may prove that the demanded premises are mineral lands.

"5. A patent to the W. P. R. R. Co. which excepts from the transfer "all mineral lands should any be found to exist in the tracts described," *does not convey* lands which were mineral.

"6. *The fact cannot be assumed that all the lands described in such patent are mineral lands, as the exception does not necessarily extend to all the tracts granted.*"

Approved in *Carr v. Quigley,* 57 *Cal.* 395, where the court said (*in banc at time when Judge Ross was on the California Supreme Court bench*): "The rehearing is denied. The decision comes within the rule laid down in *McLaughlin v. Powell,* 50 *Cal.* 64." Cited by Judge Ross in *McLaughlin v. Heid,* 63 *Cal.* 208, as not sustaining Carr v. Quigley, *supra,* but Judge Ross does not criticise the case, but in his own independent language says *that the exception was a part of the description,* and that by proving the mineral quality of the land the patent may be avoided. *Chi. Q. M. & M. Co.,* 75 *Cal.* 198, in approval of the rule, and the same in *U. Land Assn. v. Knight,* 85 *Cal.* 486. Distinguished in *Gale v. Best,* 78 *Cal.* 240-241, as a case in which the patent itself "*excepted all mineral lands should any be found to exist in the tracts embraced in the*

patents." Approved June 6, 1911, by California Supreme Court in *Van Ness v. Rooney*, 41 *Cal. Dec.* 695; 160 *Cal.* 131.

Taking up the case of *Chicago Quartz Mining Co. v. Oliver*, 75 *Cal.* 194, decided *en banc*, we find the similar rule:

> "A patent issued by the United States government to the C. P. R. R. Co. for land included within the boundaries of the grant made to it by act of congress of July 1, 1862, and the amendatory act of July 2, 1864, *is not conclusive* evidence that the land covered by the patent is *non-mineral* in character; *and a person claiming the land under a subsequent mining patent which issued in* 1883, as against a patent issued in 1870, in an action by him to quiet his title *against a grantee* of a railroad company, *may show the land is mineral, and upon such showing made is entitled to have his title quieted.*"

Approved June 6, 1911, by California Supreme Court in *Van Ness v. Rooney, supra.*

Cited to same effect in *Gale v. Best*, 78 *Cal.* 240, 12 Am. St. Rep. 48 (and note 49.)

In *Gale v. Best*, 78 *Cal.* 239 (*en banc*), it was held:

> "2. Our opinion is, that when a patent issues under a law which provides for its disposal as agricultural land, either to a railroad or to pre-emption or homestead claimants, and there is no reservation in the land except a general one of min-

> eral lands, *and no reservation at all in the patent,* then the patent must be considered as a conclusive determination by the government that the land is agricultural."

It will be noted the court uses the word "reservation" as the synonym of *"exception."*

On pages 240-241 of the *Gale-Best case* (the court having under consideration a patent *without* an exception, etc.) it was held that the decision did not conflict with the two preceding citations, for the reason *that they both contained the mineral exception,* and said:

> "AND IT MIGHT STRONGLY BE ARGUED THAT IN SUCH CASE, ALTHOUGH IT WAS THE DUTY OF THE LAND DEPARTMENT TO DETERMINE THE CHARACTER OF THE LAND BEFORE THE ISSUANCE OF THE PATENT, YET AS THE PATENT SHOWS UPON ITS FACE THAT SUCH DUTY WAS NOT PERFORMED, THE PATENTEE MUST BE HELD TO HAVE TAKEN IT KNOWING ITS UNCERTAIN AND UNSTABLE CHARACTER."

Such was our exact contention in the court below and such is *our exact contention* here.

And Judge Bean, in the case of *Eastern Oregon Land Co. v. The Willow River Land & Irrigation Co.,* 186 *F.* —— in an opinion filed November 10, 1910, with respect to such an exception, said:

"Complainant insists, however, that the issuance of patent by the government of the United States to its predecessor in interest is a conclusive adjudication that the lands described therein are non-mineral. That would probably be true if the patent contained no reservation (Barden v. N. P. R. R., 154 U. S. 288) but it contains a clause 'excluding and excepting all mineral lands should any such be found in the tract aforesaid.' This manifests an unmistakable intention on the part of the government not to convey mineral lands and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

In the recent decision of the California Supreme Court in *Van Ness v. Rooney*, 160 *Cal.* 131, the cases of *McLaughlin v. Powell*, 50 Cal. 64, and *Chicago Quartz M. Co. v. Oliver*, 75 *Cal.* 194, were unreservedly approved, and the court again squarely held: (1) *The mineral exception in the patent was valid;* (2) that the federal statute of limitations of March 2nd, 1896, could not be invoked; (3) that a patent containing a mineral exception was not conclusive of the agricultural quality of the land and was subject to impeachment; (4) that the mineral exception was part of the description. Therefore it follows, we say, that the legal title to our mineral lands did not pass under the patent, and the title remaining in the United States, we had the right to make the subsequent mining re-

locations, and that such right is property that is entitled to the protection of the law, even against the United States.

In *Irvine v. Tarbat*, 105 Cal. 243, it is said, citing the *Kemp case*, 104 U. S. 636; *Green v. Hayes*, 70 Cal. 276; *Quinby v. Conlan*, 104 U. S. 420; *Gale v. Best, supra*, and other cases, that the rule of the *finality* of a patent is expressed in the *Kemp case*, as follows:

> "A patent duly signed, countersigned and sealed for public lands which at the time it was issued the land department had, under the statute, *authority to convey*, cannot collaterally be suspended in a *court of law;* and the *finding* of the department, *touching the existence of certain facts or the performance of certain antecedent acts*, upon which the lawful exercise of that authority may in that particular case depend, cannot in a *court of law* be questioned." And the court elsewhere said:
>
> "It follows from all the cases of which the foregoing are but a fraction, that plaintiff's patent, *which is not shown to contain any reservation*, was conclusive evidence that the land in question was open to pre-emption."

And the syllabus in *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, which is an accurate digest of the case, says:

> "It is the peculiar province of the land department of the United States before issuing a patent to any land applied for, *to determine as a question of fact*, the character of the land, as to whether it is

> valuable for minerals within the meaning of that term, or agricultural ground; and its determination that the land is agricultural, *upon issuing a patent,* to a homestead settler, *without reservation of mineral lands, is conclusive as against a subsequent mining claimant of any part of the patented land not known to be valuable for minerals at the date of the patent.*"

In other words, the case squarely upholds the opinion of Judge Bean that the "exception in the patent" *repels any inference of adjudication and destroys the conclusiveness claimed by the defendants.*

Again, the California Supreme Court in the cases of *Saunders v. La Purisima,* etc., 125 Cal. 164-5, (citing the Burfenning case, 163 U. S. 321), and in the later case of *Standard, etc. v. Habishaw,* 132 Cal. 118, said: *In the absence of a mineral exception in the patent* it is conclusive of the agricultural quality of the land, which is in accordance with the opinion of Judge Bean. In fact, there is no decision to the contrary except the opinion of Judge Sawyer in the *Cowell v. Lammers* and *Francour v. Newhouse,* which were predicated on the insistent contention by Judge Sawyer that *unknown* mineral lands *passed* under the railroad grants and that as a sequence a mineral exception of unknown mineral land in a patent was void.

The patent issued is not conclusive of ownership. It shows on its face that it was issued contrary to law and before the land department had made the examination which the law required. It may be contended that the officials of the land department were the agents of the law to make the examination as to the mineral character of the land, and that they could not indefinitely defer such examination or shift the responsibility for making the same upon the courts or upon the grantee, or anyone else, as Judge Ross said, but it must also be conceded that the United States government could not part with its title to the land *except in strict compliance with the law.* That is to say, the officials of the land department could not issue a *valid patent* without first having made the examination which the law requires, and having determined what land within the grant was mineral and what was non-mineral. The proposition that public agents cannot bind the government by acts outside of and in violation of their authority, and beyond the statutes under which they act, is fundamental. The position of the defendants in this regard at least has the charm of novelty. They say that it being mandatory that there be a primary determination of the quality of the land, that this court, despite the demurrer and the record, must presume there was such primary determination and that, too, despite

the patent, their base of title which in its face conclusively shows there was *no such* determination.

The Supreme Court of the United States in *Moffat v. United States,* 112 *U. S.* 24, 28 *L. Ed.* 623, had before it a similar proposition, in such regard, and in that case the court said, speaking through Mr. Justice Field:

> "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, *and in not giving to the patents the force of valid conveyances,* is certainly a novel one. The government does not guarantee the integrity of its officers nor the validity of their acts. *It prescribes rules for them,* requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. *There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties as though performed in compliance with it.*"

The authority of the land department to issue patent is prescribed, limited, and qualified in the act of congress providing for the grant. The patent shows on its face that a condition precedent to the issuance of patent has not been complied with by the department. To uphold the patent in this case is to subscribe to a doctrine that any patent issued by the land department is conclusive and binding al-

though it was issued in direct violation of the law providing for its issuance, or in violation of the land office rules.

From the patent no one can tell what land was conveyed by the government. It excepts from the grant "all mineral lands, should any be found in the tract aforesaid." It shows that it was prematurely issued; that the examination which the law required had not been made. The cases cited by the demurring defendants on this proposition are not in point.

From an examination of these cases, as later shown in this brief, it appears that the record in those cases shows that the examinations which the law required had been made by the department, and any exception included in the patent thereafter would have been a limitation of the grant, as the question as to the mineral character of the land had been adjudicated before the issuance of the patent.

We submit, therefore, that the patent conveys no title from the government to mineral lands within the grant; whether it conveys title to any lands it is unnecessary to determine on this appeal.

Citations of counsel fall under the Barden decision. No court, except Judge Ross in this suit, ever approved the decisions of Judge Sawyer, and he did so only by implication as he did not refer in his opinion to the

decisions made by Judge Sawyer. By everyone, except counsel for the railroad company, it was granted that the opinions of Judge Sawyer, in face of the *Barden* case, were without force, but *Cowell-Lammers* is the only hope of the railroad company and they stand on the case today as the defendant railroad company did forty years ago in the California cases, making the same untimely contention that the exception is void because Judge Sawyer said so in *Cowell-Lammers* and *Francour v. Newhouse,* but discretly refraining from setting forth the basis of his decisions.

It was taken as granted by the courts and by all the executive departments of the government at the time of the *Barden* decision that it was the duty of the land department to insert the mineral exception in patents when the government had not had an opportunity to investigate and determine the quality of the land before the issuance of the patent and Mr. Justice Field in the *Barden* case in discussing how and when a patent should issue in an instance where there had been no opportunity for investigation and determination said (*Barden case,* 154 *U. S. at p.* 330):

> "The delay of the government in issuing patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert in the meantime by possessory action (*as held in Deseret Salt Co. v. Tarpey,* 142 *U. S.* 241)

its rights to lands which are *in fact non-mineral* but such delay as we will observe cannot have the effect of entitling it to receive, as, is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, *and is not authorized to do so, without excepting mineral lands* until it has had the opportunity to have the country or that part of it for which patent is sought, sufficiently explored to justify *this declaration in the patent*, and it would be as a *determination that no mineral lands existed therein.*"

The court by the word 'declaration' was referring to a statement of the quality of the land which it said should be inserted in the patent. The decision in the *Barden* case was only reached after much discussion and labor on part of this court and Judge Ross swept the decision aside, saying no patent was before the court for consideration, but we contend that if that portion of the *Barden* opinion relating to a patent and its functions be eliminated nothing will be left and the subsequent fifty or more decisions relating to patents, based on the *Barden* opinion, will become *functus officio.*

As to the fact that the S. P. R. R. Co. simply filed its list of selected lands with the local officers at Visalia, (California), and they issued a certificate they could find no mineral claim pending in their office, and that the examiners in the mineral division of the general land

office at Washington also certified there were no mining filings in their records, proves nothing, and is no proof of the non-mineral character of the land. *That fact is tersely pointed out in the Barden case at page* 320.

Now, how did the demurring defendants meet the *Barden* case? They do it in this way. They cited the rulings in the cases of *Cowell v. Lammers,* 21 *F.* 200, and *Francoeur v. Newhouse,* 40 *F.* 621, *and Shaw v. Kellogg,* 170 U. S. 312, and a ruling, concerning a perfect patent issued under a perfect record by *Secretary Hitchcock,* 32 *L. D.* 342.

Now as to *Cowell v. Lammers:* Judge Sawyer was an insistent and consistent defender of the legal proposition that only *known* mineral lands were excluded from railroad grants. That was the sole basis of his decisions in *Cowell-Lammers* and *Francour-Newhouse* cases, and that was the sole base of his decision in *Barden* case when it came up before him at circuit, and when the Federal Supreme Court reversed the *Barden* ruling made by Judge Sawyer and established the rule that *unknown mineral lands* were excluded from railroad land grants, then the rulings of Judge Sawyer fell, as they were all based on the single proposition that only *known* mineral lands were excluded from the railroad land grants, and that *unknown mineral* lands passed under the grant to the railroad com-

pany, that there was consequently no authority for the inclusion in the patent of an exception of *unknown mineral lands,* and that was the reason why he held as he did concerning the invalidity of the exception and the invalidity of a mining location made in the presence of a reserved and excepted patent of "unknown" mineral lands. Such ideas are amplified in *Francour-Newhouse* case, and when the *Barden* case was before him at circuit he held that the unknown mineral lands passed under the grant *and the patent added nothing to the title.* (46 *Fed.* —.) If the defendant railroad company is still insistent that the ruling of Judge Sawyer must control this controversy, we will be curious to learn how they will treat the final expression of Judge Sawyer on the subject *"that the patent adds nothing to the title."*

Shaw v. Kellogg, 170 U. S. 312, cited by the demurring defendants, is only particularly important in one instance, and that is where (p. 341) Justice Brewer cites the *Barden* case as to the necessity for an examination of the land by the interior department and its determination, and expressing in the patent *that the land is non-mineral* before a grant of *agricultural land* passes unassailable to the grantee. The syllabus reads as follows:

> "In 1860 congress granted a quantity of land in New Mexico in fulfillment of a grant of non-mineral land made by Mexico before its transfer, the land

to be selected by the grantees and the surveyor general to survey and locate the lands selected, and thus determine whether it was such as the grantee might select. The grantees made their selection, and after considerable correspondence as to the forms of the application, and as to evidence that the lands were not mineral lands, *the surveyor general, under direction of the land department, approved the selection and made the survey and location. The land department approved the survey, field notes and plats,* and the parties were notified thereof, *but no patent was issued, as congress had not provided for such issue. The land department noted on its maps that this tract had been segregated from the public domain and had become private property, and so reported to congress, and that body never questioned the validity of its action. The grantees entered into possession. fenced the tract and paid all taxes assessed upon it as a private property, by the state.* Held, that the action taken by the land department was a finality, and that the title passed, all having been done which was prescribed by the statute." (End of syllabus.)

It will be remembered that the "Baca Grant" excluded only *known* mineral lands and Mr. Justice Brewer held accordingly that an exception of *"unknown"* mineral lands *would be a limitation of the grant.* That, coupled with finality and actual decision of character of land, was the basis of his decision and is the one we are contending for.

The surveyor general, under the express direction of the land department, and congressional direction, examined the land for mineral, and after such examination *reported the land* to be non-mineral, and that report was *approved* by the land department, and consequently there was a square determination and adjudication by the land department that the land was non-mineral, and thereupon the title vested in the grantees. And that was the end of the matter, and of course after such a final determination, no one contends that the subsequent discovery of mineral would upset the confirmed congressional title. In our case the "subsequent" discovery of mineral is only material, possibly, as adding to our right to make a relocation, as both the S. P. R. R. Co. and the major title, the United States, admit the lands in controversy are extraordinary mineral lands, the richest in the world! In the *Shaw-Kellogg* case Judge Brewer said (p. 332):

> *"The tract thus located was, as a whole, to be non-mineral. No provision was made for indemnity land in case mineral should be found in any section or quarter section, so that when the location was perfected the title passed to all the lands or none."*

It will be noted this court stated the land *as a whole* was to be mineral and if the surveyor general had made one min-

eral discovery the entire grant would have failed as would a homestead selection. *In our case no harm can result to the railroad company, as the lieu land still exists.*

At page 334:

"It will also be perceived, the surveyor general as well as registrar and receiver of the land office each *certify* that the land *was non-mineral.* * * * " (They did not simply certify as here that no mineral claims were pending in the local land office.)

At page 337 he said: *"In this, three things are to be noticed:*

"1. That the surveyor general, the officer specially designated (by congress) to make the survey and location, the one primarily charged with the duty of determining its character, *decided the land was non-mineral. His certificate to that effect is unqualified.* His certificate of approval to the field notes and to the survey is the same. *So far, therefore, as his action is concerned, there was an adjudication that the land was non-mineral.*

"2. The land department directed the matter to be closed, specified how it should be closed, and recorded and filed without question the report of the surveyor general's action.

"3. The only qualification is found in the direction of the land department followed by the action of the surveyor general in adding to his certificate of approval of the plat, that it is 'subject to the conditions and provisions of the act of con-

> gress of June 21st, 1860.' *There was no reservation in the matter for further consideration* in the land department or by the surveyor general. There was a *finality* so far as they are concerned,"

and Judge Brewer points out in his opinion that the grant was only to exclude "known" mineral lands without lieu provision and applied to the case the rule in the *"known"* mineral case of *Deffebach v. Hawke* expressly *repudiated* in the *Barden* case in so far as "unknown" lands were concerned. Counsel argued below that the grant was similar to the railroad grants so far as the quality of the land was concerned but the difference is that the grant did not vest until it was actually determined there was no known mines in the lands and that they were not mineral; in other words the Baca grant was a float and the grantees could keep on making selections until they found a tract that was finally determined to be non-mineral and then title vested.

The final reason why the *Shaw-Kellogg* case has no application to this controversy is, that it was an instance of a grant made pursuant to the treaty obligations arising under the treaty of *Guadalupe-Hidalgo* and over which the courts could exercise no jurisdiction either to control the survey or the action of congress, which reserved the entire matter to the political department of the government.

This court has frequently held, so often in fact that no citation of authority is necessary, that except in instances of fraud, imposition or mistake, the courts could neither revise nor supervise the action of congress in confirming Mexican grants nor revise or supervise the acts of those persons or departments delegated by congress to fix the boundaries of the grant or any matter in connection of the same unless congress had expressly provided for judicial supervision.

The Baca Grant was made by congress pursuant to an obligation arising out of its treaty obligations and in the exercise of the sovereign power of the government and in making the grant, it provided for an examination and survey of the floating grant and vested all authority, that it saw fit to delegate in the surveyor general of New Mexico, and he having exercised that jurisdiction, there was a complete finality that the court could neither revise nor supervise, and consequently it was neither within the power of the land department to limit or to enlarge the terms of the grant nor of the court to change the boundaries or to alter the survey and consequently any expression of opinion of Mr. Justice Brewer upon other matters, such as what might or might not be included in a patent was merely *obiter dictum,* and this is especially so when it is recalled that no patent was

before the court for its consideration and the act of congress did not provide for a patent and there was no authority in law for the issuance of a patent, while in the *Barden* case the grant under consideration expressly provided for a patent and the legal title to the land granted remained in the United States until the patent provided for in the grant was issued.

Then we come to the ruling of Secretary Hitchcock in 32 L. D. 342. We will take the same up by paragraph, with very brief comment, though we desire to say at the outset, as the base for these comments, that whether *the ruling was right or wrong,* it has no application to the patent at the bar *as it refers to a patent issued after examination and decision* and in accordance with the rules of the land department; a perfect patent founded on a perfect record.

It will be noted by this court that under the present administrator, the secretary of the interior has returned to the old practice of inserting the mineral exception:—so that as a matter of fact the opinion of Secretary Hitchcock made up without hearing or argument or contest on the application of a railroad grantee *has been reversed!* The case reads:

"Railroad Grant—Patent—Exception of Mineral Lands.—Northern Pacific Railway Co. There is no authority for the insertion, in patents issued under railroad land grants, of the clause,

'excepting all mineral land, should any such be found in the tracts aforesaid'; and directions are given that in all future railroad land grant patents said excepting clause be excluded.—Secretary Hitchcock to the commissioner of the general land office, December 10, 1903.

"The department *has considered the request* by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, that you be instructed to eliminate the following clause from patents issued under its land grant, namely: 'yet excluding and excepting all mineral land should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be held to include iron or coal lands.'

"In reporting upon said request your office letter of December 11, 1901, states that it is questionable whether there is authority for its insertion, *but that this excepting clause has always been introduced into the patents issued to the company, which now cover millions of acres of its grant, and this has also been done in the patents issued under all other railroad land grants having a like excepting clause.*"

It will be seen

(a) The ruling was made without notice, contest or hearing, on the *ex prate* application of a railroad! and thus a rule of action that existed in the department of the interior for forty years, and followed by men like Lamar, Vilas, Noble, Teller, and others, goes by

the board on a misunderstanding that the "exception" was only to be inserted in instances when there had *been no* examination and decision!

Then follows:

> "Mineral Lands Excepted. All mineral lands, other than coal and iron, are excluded from the Northern Pacific land grant, whether known or unknown, at the time of the attachment of rights hereunder, either by definite location or selection. *Barden v. Northern Pacific R. R. Co.*, 154 *U. S.* 288."

There is no significance in the above paragraph *except*, as will be seen all through the ruling, that it was the intention of the department *to follow* the *Barden* case, and is an attempt on the part of the department to construe the same.

"Who Shall Determine The Character Of The Land Within The Limits Of A Railroad Grant?" The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the land department. In *Litchfield v. Register and Receiver*, 9 *Wall.* 575, 577, *it was said:*

> "The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of congress, or

of the proper department? Has it been granted by any act of congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion."

All this clearly shows that an examination and a decision is contemplated, not a mere issuance of a patent as in this case without any examination, decision or adjudication.

In *Steel v. Smelting Company*, 106 *U. S.* 447, 450, it was said:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, *and to see that requirements of different acts of congress are fully complied with.* Necessarily, therefore, *it must consider and pass upon the qualifications of the applicant,* the acts he has performed to secure the title, *the nature of the land,* and whether it is of the class which is open to sale. *Its judgment upon these matters* is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

Here, again, is seen the necessity of an examination and a *decision* as to jurisdictional facts.

In *Burfenning v. Chicago, St. Paul, etc.*, 163 U. S. 321, 323, it was said:

> "Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not, presents a question of fact not resting on record, dependent on oral testimony;* and it cannot be doubted *that the decision* of the land department, one way or the other, in reference to these questions, is conclusive and not open to re-litigation in the courts, *except in those cases of fraud, etc.*, which permit any determination to be re-examined. *Johnson v. Towsley*, 13 *Wall.* 72; *Smelting Co. v. Kemp*, 104 *U. S.* 636; *Steel v. Smelting Co.*, 106 *U. S.* 447; *Wright v. Roseberry*, 121 *U. S.* 488; *Heath v. Wallace*, 138 *U. S.* 573; *McCormick v. Hayes*, 159 *U. S.* 332."

How can a question of fact be determined unless there be a decision on it?

In *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 635, it was said:

> "Whether the lands sought to be purchased as mineral lands were of that character *was a matter for the determination*, in the first instance, of the land department; and there was jurisdiction in that department to pass upon *every question arising upon applications* to purchase them as mineral lands."

In *Barden v. Northern Pacific R. R. Co., supra,* (pp. 328, 329), it was said:

> "If the land department *must decide* what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, *it must also decide whether lands are excepted because they are mineral lands.* It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, *or in refusing to patent them because the evidence was insufficient to show* that they contained minerals, in such quantities as to justify the issue of the patent."

These cases clearly establish the jurisdiction of the land department in the premises.

We have no quarrel with the ruling as to the jurisdiction and the DUTY of the department, *but we say it must be exercised.*

> "P r o c eedings Before the Land Department Had Upon Lists and Selections Made of Lands Under a Railroad Land Grant Preceding the Issue of Patents Thereon.—All such lists and selections are required to be filed in the local land office of the district in which the lands are situate, and are by the officers of that district carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894 (19

L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location, are eliminated therefrom. A supplemental list of these elminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list is eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this department for approval, and upon such approval the patent of the United States issues."

And the court will remember that *not one* of these requirements was had in the case of the patent at bar. The S. P. R. R. Co. is simply trying to create a new rule which will give to it the land to which it is not entitled, which the congress never gave to it!

When the court reads the above paragraph it will remember that the circular of July 9, 1894, went into force *one* day before the patent issued! If this rule controls the application then pending it will be found that the rule required affidavits made by the officers and agents of the railroad that they had been all over the lands selected and knew their quality, that they were non-mineral, etc., and later in the cir-

cular it is pointed out that this requirement *shall be waived in instances of pending applications when there is a non-mineral affidavit for every* 40 *acres!*—making necessary in case of the patent at bar 11,022 affidavits, or covering that number of quarter sections, and still Mr. Madden simply said the lands were non-interdicted mineral lands (whatever that means), and he got a patent for 444,000 acres of land! in which our mineral lands were included.

There was no proof, no publication in our case. The record was *two* days at Visalia, then it went to Washington and remained pigeonholed until a few days (13 days) before patent issued! That's all!

The ruling continues:

> "Issue of Patent for Lands Under a Railroad Land Grant Determinative of the Character of the Lands Patented.—As before shown, it is the duty of the land department *to determine primarily the character of the lands within the limits of all railroad land grants*, and the usual rule fixing a time for the attachment of rights under such grants does not *stop inquiry into this matter by that department.* When, however, the land department, *charged with this duty, and after due investigation of the matter as provided for by its rules and regulations*, patent lands as falling within the terms of these grants, such action is necessarily determinative of the character of the lands patented!

"Effect of Such Determination.—When the law has confined to a special tribunal the authority to *hear and determine certain matters,* its *determination,* in the absence of fraud, is conclusive upon all others."

Johnson v. Towsley, 13 *Wall.* 72, 83.

Very true, but *if it has not heard* and has not decided and no judgment has been made, will counsel contend that the patent is an adjudication of every fact that might be necessary to uphold the result of a decision, namely, the patent?

In the case of *Barden v. Northern Pacific R. R. Co., supra,* the court, (*pages* 330 *and* 331), states:

"It is true that the patent has been issued in many instances *without the investigation* and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can *be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by congress, and stating it in instruments transferring the title of the government to the grantees,* reposes in officers of the land department. *Until such patent is issued, defining the character of the land granted, and*

showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. *The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form,* upon a judgment, rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, *that the lands were non-mineral,* would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in proceedings respecting the title."

"In certain cases involving the question as to the character of lands claimed under the grant made to the states of swamp and overflowed lands, the courts *have permitted the introduction of oral evidence to determine* the character of such lands, but these cases are carefully considered in the case of *McCormick v. Hayes, supra,* where it is said by the court (page 342 of its opinion):

"There is in this case no conflict with what we decide in the present case, but, on the contrary, *the strongest implication, that if, in that case, the secretary had made any decision,* the evidence would have been excluded."

"The secretary had made any decision!" That is our case; he made none; he did nothing. We charge it; it must be assumed to be true here, and the record proves it.

Not only the Barden case, the Shaw-Kellogg case, but the cases of McCormick-Hayes and Wright-Roseberry (and there are no cases to the contrary) support the proposition that until there is an examination, determination and expression there is no finality. If the S. P. wants a finality that will forever preclude every nomadic or speculative litigant from attacking its innocent grantees, etc., etc., let it have the court pass on and forever settle the agricultural quality of the greatest and richest mineral lands in the world.

> "It follows that, in the absence of fraud, the determination effected by the issue of patent as to the character of the lands patented is conclusive, and that the insertion of the clause hereinbefore referred to is without effect and can serve no good purpose."
>
> "Exceptions Contained in Letters Patent of the United States.—It has been shown that it is as much the duty of the land department to determine whether lands are excepted from a railroad land grant because mineral in character, as it is to determine whether they are excluded because embraced in some other term of exception found in the granting act, *that the issue of patent under such a grant* is a determination that the lands patented are of the character granted, and that in the absence of fraud such determination is conclusive."

The error here made is in concluding that the patent is the judgment while in fact it is the result of the judgment and

if there was no judgment there can be no conclusive judgment and the rules to which the secretary was referring to provided *for an antecedent* examination and determination.

Why, then, should one term of exception be carried into the patent when all others are excluded?

In *Davis v. Weibbold*, 139 *U. S.* 507, the question as to the effect to be given to excepting clauses found in patents issued under acts of congress providing for the disposal of public lands, was fully considered by the court, and on pages 527-528 of its opinion it was said:

> "But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. *The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the land department*, resting for their fitness only upon the judgment of those officers."

Deffebach v. Hawke, 115 *U. S.* 392, 406.

While it is true that a reservation of streets, buildings, blocks, alleys in a mining patent would *diminish* the grant, it cannot be successfully contended that an exception of "*all* mineral lands" *diminished* a grant that expressly precluded *known, unknown* and all kinds of mineral land from its operation! Surely *Davis-Weibbold* is not authority against us?

Such was the only exception in the *Deffebach-Hawke* case. The exception was not authorized by the mining law and as under the mining law a patent *carries all the surface* of the land, in fee simple, it would be simply absurd to reserve some of the surface after the land department had decided the applicant had earned and was entitled to his patent, but there is nothing in common with this decision and an instance where *unknown* mineral was barred by the grant.

In *Deffebach v. Hawke* it was said:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, *with recitals showing a compliance with the law* and the conditions which it prescribed."

We are content to stand on the citation from the *Deffebach-Hawke* case as we admit that a patent r*eciting* compliance with the law and the conditions which it prescribed

would be conclusive, that is an adjudication and statement in the patent, that the land was non-mineral and agricultural would be forever conclusive. But how may such citations and ruling support our patent? Any suggestion that it does is an absurdity.

> "There is clearly, therefore, no warrant for the insertion in patents, issued under the railroad land grants, of the clause 'excepting all mineral land should any such be found in the tracts aforesaid.'"

If any statement in this connection were deemed necessary in the patent, which is not believed to be the case, it should be to the effect that the lands patented are found to be non-mineral in character and otherwise subject to the grant. *The letter* from the railway company, now under consideration, in referring to said excepting clause, states:

> "Whilst its inclusion cannot in law lessen the title acquired by the company, it can and frequently does induce innocent third parties not well versed in the law to engage in vexatious and expensive litigation, in the belief that there may be expected from the patent to the railroad company any minerals which shall be found in the patented lands thereafter."
>
> "After careful consideration of the matter, therefore, the request is granted, and you are directed, in future, to exclude said excepting clause from all railroad land grant patents."

It may be noted in passing that, 1911, the secretary of the interior, acting under the advice of the department of justice, reversed the ruling of Secretary Hitchcock by returning to the practice of inserting the mineral exception in railroad patents.

There are just *four things to be noticed* in connection with these concluding paragraphs of the Hitchcock ruling, namely:

1. That it was clearly and distinctly pointed out in the *Barden* case that the *Weibbold-Davis* and *Deffebach-Hawke* cases did not and could not apply *to a railroad land grant case,* and that they solely refer to grants that only precluded from their operation *"known"* mineral lands and consequently an exception of "unknown" mineral lands *would be a limitation* of such a grant, while in the railroad land grants both *known and unknown* mineral lands were precluded from passing!

2. "No innocent third persons" or others were ever defeated in any court at any time or place by the N. P. R. R. Co. in any action where the mineral exception existed. If such cases exist counsel will be glad to produce them. *They cannot.*

3. The most surprising thing about the Hitchcock ruling is, that, citing the *Barden* decision *in extenso* in search for

a precedent against a mineral exception, the department overlooked entirely that portion of the *Barden* case which reads as follows (p. 331):

> *"The government cannot be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral lands, until it has had the opportunity to have the country, or that part of it for which the patent is sought, sufficiently explored to justify this decalaration."*

Judge Ross intimates that this part of the *Barden* decision is *obiter dictum* as no patent was before the court; if so, all other portions of the opinion relating to patents falls under the same criticism as does the observations of Judge Brewer in the *Shaw-Kellogg* case concerning patents as there was *no* patent in the latter case.

The final suggestion is that Secretary Hitchcock was passing on the question, should a mineral exception be inserted in a patent *where the lands had been examined and their quality properly passed on and following a statement in the patent that the lands were not mineral.*

With such a proposition we have no contest, *but* will anyone claim that it applies *to an imperfect patent founded on an imperfect record?* If so, it means that the cogent, strong and positive ruling and opinion of the

court of last resort, speaking *ex cathedra* is a lifeless and puerile thing, for no language could make clearer that a patent issuing to a railroad company under a railroad land grant *is not* conclusive until there has been by the United States land department an examination of the land, an actual determination of its quality and the expression of that determination in the patent, and in the absence of such *examination* and *determination* there could be no expression of quality that would be conclusive, that such determination is yet to be made, and that by reason of the fact, coupled with the mineral exception, the legal title to all mineral lands within the tracts described in the patent has not passed from the United States, and such mineral lands are subject to location under the mining laws of the United States, and of this case Judge Ross says it was *obiter* because there was no patent before the court and cites in that connection as the base of his opinion, *Shaw v. Kellogg,* construing a grant that did not provide for a patent! Surely, if the *Barden* case is *obiter* the *Shaw-Kellogg* is also, for the former provided for a patent while the latter grant *did not!*

So far as may be ascertained from the opinion of Judge Ross it would seem that he had not in mind at all the *form* of the patent in this suit except as in so far as the mineral exception was concerned.

This same proposition of the right of the government to insert a mineral exception in its patent and of the non-exclusiveness of such a patent is further exemplified in other cases.

In the syllabus of *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, which is an accurate digest of the case, we find:

> "It is the peculiar province of the land department of the United States *before issuing a patent* to any land applied for, *to determine as a question of fact, the character of the land*, as whether it is valuable for minerals within the meaning of that term or agricultural ground; and its *determination* that the land is *agricultural* upon issuing a patent to a homestead settler, *without reservation of mineral lands*, is conclusive against a subsequent mining claimant of any part of the mineral land not *known* to be valuable for minerals at the time of patent."

The California Supreme Court in this instance was not speaking of any particular kind of patent, but was referring to the conclusiveness of a patent stating that a patent is conclusive unless it otherwise appears on its face.

This case is important in many respects. Justice Brewer, in *Shaw v. Kellogg*, in reference to a patent to a homestead claimant, made mention of the fact that it was

not competent to insert in such a patent a mineral reservation and counsel in the court below succeeded in having Judge Ross apply that doctrine to this suit. But Judge Brewer, *enumerating* all instances where exceptions of unknown mineral land should not be inserted, *did not include* railroad land grant patents! Why not? The difference is striking, apparent, elementary. The one rule applies to *"known"* mineral lands and that is the rule of the *Shaw-Kellogg* and kindred grants and cases. Justice Brewer says so in his opinion and such is the *base* of his opinion. The other is the rule of the *Barden* case, "unknown" mineral lands, and that rule as pointed out in the Federal Supreme Court in the *Barden* case *is the rule applicable* to the land grant cases and of this suit and differentiates the same from the *Shaw-Kellogg, Cowell-Lammers, Davis-Weibbold* and *Deffebach-Hawke* cases, and Judge Bean adopted the correct rule while Judge Ross fell into the error of applying the rule in "known" mineral land grants and cases to "unknown" mineral land grants and cases. Judge Sawyer fell into the same error in the *Cowell-Lammers* and *Francour-Newhouse* cases, where at great length he argued that the mineral land exception was void *because* only *known* mineral land was precluded from the operation of the grant! *"A verbis legis non est recedendum."*

Since early days, even before the establishment of the department of the interior, and even as early as 1834, it has been customary to insert reservations in patents. (17 *Atty. General's Opinions, p.* 248; *Lamprey v. State* (*Minn.*) 38 *Am. St. Rep.* 541, *and Reynolds v. Iron-Silver Mining Co.,* 116 *U. S.* 687.)

In the latter case the *Silver Mining Co.* brought suit in ejectment to recover the possession of certain lands which the plaintiff held under a patent which the government had issued under a placer mining claim. The defendants below asserted the right under which they were working in lode claims which were older than the title of the plaintiff. The patent itself declared it was subject to the following restrictions (stating them). The court said:

> *"Without deciding on the effect of the acceptance, without protest,* of a patent with such exceptions in the granting clause where their insertion in the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions *but give expression to the intent of the statute."*

Will it be contended here that our exception fails to give expression *to the intent of the statute?* If the exception but gives expression *to the intent of the statute*, can it be said the insertion of the intent of the statute

in the patent is nugatory or constitutes a limitation of the grant, *or diminishes or increases* or in any way deprives the defendant *of an acre* of land that congress intended should pass to it? The proposition that the mineral exception in our patent could in any way diminish the grant of July 27, 1866, *is simply* absurd.

From the above it clearly appears that the issuing of a patent with the mineral exception, the exception being in accordance with the mineral exception in the granting act, and the acceptance, *without protest,* of such a patent by the grantee, is a recognition of the fact that no legal title to the excepted and reserved lands was ever intended to or did pass, and that by such patent the patentee obtained no title to the excepted lands whatever. This view is borne out by the attitude and conduct of the railroad company subsequent to the issue of the patent. Up to, at least, 1904, it was the policy of the grantee to insert in deeds to purchasers of the granted lands a clause *"excepting and reserving all claim of the United States to such lands as mineral lands."* (*Steese v. Hunt, 75 Cal. p.* 620; *Deed of S. P. R. R. Co. to Berry, appendix.*) So it will be seen that for 24 years the defendant railroad *upheld the validity of the mineral exception,* upheld the integrity of the patent containing the mineral exception. Again, in *Steese v. Hunt,* 75 Cal. 620, the California Supreme Court had oc-

casion to pass on the mineral exception and the rule applicable in such cases. The syllabus well expresses the case:

> *"A person claiming under a mineral location* to be entitled to the possession of land previously patented to the S. P. R. R. Co. in pursuance to a grant made to that company, in order to establish his right of possession as against a person claiming under the patent, must clearly show that at the date of the patent the land under the conditions then existing was more valuable for mining than for agriculture and was known to be such, and in determining the relative value of the land for such purposes subsequent changes in the conditions affecting it cannot be considered."

This ruling was made *independent* of the mining exception and was made on the theory that if the railroad company KNEW at the time of patent that the land was more *valuable* for mining than for *agriculture, the patent was void,* carried no title and was subject to attack by a *subsequent mining locator,* independent of the mineral exception. The mineral exception, however, is referred to in the opinion, and there was no question of the legality of the same; and, as we are told, scores of such cases never passed beyond the Superior Court *as even the defendant railroad company inserted the United States mineral exception in its deeds and contracts to convey land.* Such was our *exact*

contention in the court below, coupled with the basic claim that, in any event, the mineral exception saved the legal title to the United States.

In meeting the foregoing authorities the demurring defendants were compelled, in the court below, to contend that rule so applied was not recognized by Judge Sawyer in *Cowell v. Lammers*, and not endorsed by *Lindley* in his work on Mines.

The former objection is met by the answer that the *Cowell-Lammers opinion* fell under the *Barden* decision for the *Cowell-Lammers* opinion was rendered under the express theory and *insistent contention* of Judge Sawyer, that *only known mineral lands* were precluded by the granting act! And the opinion of Mr. Lindley that the California decisions upholding the validity of mineral exception *were wrong, is based solely on Cowell-Lammers!* In fact, *Cowell-Lammers is the sole text* of both the S. P. R. R. Co. and Mr. Lindley, who evidently has not read what Judge Sawyer said about the case in *Francour v. Newhouse!*

Now, if Judge Sawyer was wrong, Mr. Lindley is also wrong. The *Barden* case holds they are both wrong and as the Supreme Court can do no wrong it necessarily follows that Judge Sawyer and Mr. Lindley cannot be successfully cited here. The whole case of the defendant is built upon the *exploded* cases

of *Cowell-Lammers* and *Francour v. Newhouse*, and both those cases were predicated on the single proposition that the *mineral exception* in the patent *was void* because only *"known" mineral lands were precluded by the grant!* And *Shaw v. Kellogg* turned on the expressed holding by the Supreme Court that only *"known"* mineral lands were contemplated by the *Baca grant*, and consequently any exception of *"unknown"* mineral lands was authorized, being a limitation of a grant that *expressly carried "unknown"* mineral lands!

Judge Sawyer was very explicit in *Francour v. Newhouse* and tells why and how he decided the issue in *Cowell v. Lammers* and in the *Barden* case, while at circuit (46 F.) he said that under a railroad grant a patent was nothing as the title to the railroad company *passed by* the *grant* and the *patent added* nothing to the title and that was one of the reasons why this court had to take up the question of the office and effect of a patent in the *Barden* case.

In the court below counsel attempted to establish the claim that the patent having issued the court must assume, although the contrary was admitted by the demurrer, that the land was not located; that no discoveries had been made or if locations under decisions had been made, that the same had been abandoned. The proposition is self-answering.

It has no foundation in authority, in law or in morals, and especially so in view of the fact that the S. P. R. R. Co. has never exercised physical domination over any part of the land and no widows or orphans are in tears at the bar of this court! And there are no innocent purchasers here, except, possibly, the Kern Trading and Oil Co., and the degree of its *innocence* is not yet apparent.

Dropping back into the California state cases on this subject of the conclusiveness of a restricted and reserved or other patent, we find a solid wall of cases confronting the defendants. Judge Ross did not attempt to differentiate them or any one of them. None of them are mentioned in his opinion; he criticises none of the opinions of his former brethren on the state supreme bench nor reverts to his former utterances! He simply took the basic position that an exception of "all mineral lands" *was a limitation* of and *diminished* a grant that absolutely *precluded* the passing of "all mineral lands" known and unknown and such basic error resulted in his holding the exception *was nugatory and void!* In the court below counsel cited one portion of the opinion rendered in *Gale v. Best*, 78 Cal. 235, (decided prior to the *Barden* case), to the effect the issuance of the patent created the presumption that the land was agricultural, but the court immediately added:

> "When a patent issues under a law which provides for the disposal of public lands as agricultural lands and there is no reservation in the law except a general reservation of mineral lands *and no reservation at all in the patent,* the patent is a conclusive determination by the government that the land is agricultural and it is not competent, therefore, in an action in a *court of law* to re-open the question of the character of the land."

That is the rule in California today and in all the cases that have arisen under the rule it will be found on examination of the transcripts on file in the state law library at Sacramento that in none of them is it the fact that it was ever held that a patent was conclusive in the absence of an *actual examination and actual determination* of the subject matter of fact in the federal land office before issuance of patent.

Take, for instance, the case of *Paterson v. Ogden,* 141 Cal. 43, where it was said the issuance of a United States patent *as agricultural in character* is conclusive, but an examination of the record discloses that there was a homestead which, through regular channels and in the regular method of the law, ripened into a patent *which disclosed* the *agricultural quality of the land* and, of course, this was an instance of *"known"* mineral land cases, as was *Gale v. Best.* The same state of facts with complete records in the federal land office, including actual examina-

tion and actual determination, together with the same state rule, is to be found in

Irvine v. Tarbat, 105 Cal. 243;
Green v. Hayes, 70 Cal. 276;
Williams v. San Pedro;
Stewart v. Sutherland, 93 Cal. 270;
Dreyfus v. Badger, 108 Cal. 65;
Saunders v. La Purisima, 125 Id. 164-5;
Standard, etc. v. Habishaw, 132 Id. 155;
Hermocilla v. Hubbell, 89 Id. 5.

The state rule (and which is the federal rule) is well exemplified by the opinion of Judge McFarland in *Richards v. Wolfling,* 98 Cal. 195, in which he said:

> "The court further said (*Sparks v. Pierce,* 115 U. S. 408): 'The issue of the patent to 'A' was equivalent to a determination by the United States in an adverse proceeding to which, in law, B was a party, that A had title to the discovery superior to that of B and consequently B's location was invalid.' But the record in that case and in the citation shows that there had been an actual contest in the *federal land office between the parties* and that the contest *had been referred back to the state Superior Court.*"

This position is well illustrated by the decisions in *Reynolds v. Iron Silver Mining Co.,* 116 U. S. 687, and *De Cambra v. Rogers,* 189 U. S. 119.

In the former a patent had issued for a placer mining claim and it was held not conclusive as against a locator of a lode claim within the placer limits. There had been a complete determination in the land office on the question of the placer claims but no determination was made concerning the existing of lode claims. The statute on which the patent was issued declared that it should not confer any right to a vein *known* to exist within the time the grant was made, just as our granting act forbade the passing of *all* mineral lands. No presumption seemed to attend the unfortunate patent in that case, and no presumption arose that there were no lode claims and in a private suit the patent fell! Counsel contended the case was inapplicable and that the patent was not conclusive in such instances because a *placer* applicant *did* not, *could* not apply for known lodes and thereby the question was not determined in the land office! which is our actual contention here, namely, that a patent is only conclusive in matters that the antecedent record will show were *actually* determined! The latter case arose in California (132 Cal. 502) and on writ of error was affrmed. The court said:

> "That a contest (between the parties) ensued which was finally *decided* by the secretary of the interior in favor of Rogers and the land patented to his widow and son. The cross-complaint further averred that, although the decision ap-

parently rendered by the secretary of the interior was signed by him, yet in fact for the want of time and opportunity the secretary had not read or heard read the evidence in the contested case and simply signed his name to a report prepared by one of the clerks in the department.

"This cross-complaint states no question of law decided in these contest proceedings in the land department adversely to De Cambra. Indeed, the grounds of the decision are not disclosed. *It appears that De Cambra offered testimony* showing his qualifications, settlement, occupation, etc., and it is stated *some evidence* was given in support of the Rogers application. * * * *But it is well settled that the decisions* of the land department upon questions of fact is conclusive in the courts. (*Burfenning v. Chicago, etc.*, 163 U. S. 323; *Johnson v. Drew*, 171 U. S. 99; *Gardner v. Bonestell*, 180 U. S. 363)."

And then the court goes on to say that when the secretary *has made a decision it is conclusive*, a reiteration running through all the cases that an examination of and a decision on a question of fact, right or wrong, honest or dishonest, is a finality, but that there is no finality until there be such an examination and decision. This view is fortified by the much relied on ruling by Secretary Hitchcock that the insertion in patents of the mineral exception is not justified by the law. It will be remembered that the secretary *was not passing on the patent at bar or on one executed under like circumstances or*

similar to it. He was passing on a patent, as will be seen by his opinion (32 L. D. p. 342), *founded on a perfect record;* where there had been proper proof *that each* 40 *acres* had been examined and *proven to be non-mineral.* This is apparent because he is discussing in 1904, a patent issued pursuant to the rules of July 9, 1894, *which requires such proof.* He was passing on a *patent about to be issued in compliance with the law, with the rules and practice of the department, in an instance where there had been complete examination and actual determination; where adverse claims had been advertised for;* and then he decided that in such an instance, after it had been legally and lawfully and properly determined that the land was agricultural, he would follow such determination by issuing a patent in proper form, with the necessary recitals and statements, and consequently it would be a nugatory act to insert an exception of unknown mineral lands in the patent after it had been determined that the land was agricultural and contanied *no* minerals. But this was long after our patent issued, which was at a time that the rules and procedure referred to were not in force and which were not followed in the case of our patent. We will instance one fact in connection with this subject. To bring the railroad company within the rule of the land office on the day the patent was issued would have required the filing or upwards of eleven thousand

affidavits or proof specifically concerning that number of legal subdivisions concerning land inspection, to carry to patent the land applied for, or, to be accurate, 11,022 affidavits. In his opinion the secretary points out what must be done before a patent may issue, and it was on that *procedure* and under those rules that the opinion was written, and not under the rules and procedure existing at the time our patent issued. *It was never contemplated to apply to such an instance as ours.* Following are the rules and procedure:

> "Proceedings Before the Land Department Had Upon Lists and Selections Made of Lands Under a Railroad Land Grant Preceding the Issue of Patents Thereon. All such lists and selections are required to be filed in the local land office of the district in which the lands are situate, and are by the officers of that district carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office where under the circular of July 9, 1894, (10 L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location, are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list is eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agri-

cultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in *what is known as clear lists and certified to this department for approval, and upon such approval the patent of the United States* issues."

And then followed this rule as to examination and determination:

"Issue of Patent for Lands Under a Railroad Land Grant Determination of the Character of the Land Patented. As before shown, it is the duty of the land department to *determine primarily* (and to 'determine primarily' means that the examination and determination must be made before the patent issues) the character of the lands within the limits of all railroad land grants, and the usual rule fixing a time for the attachment of rights under such grants does not *estop inquiry into this matter by that department.* When, however, the land department, *charged with this duty, and after due investigation* of the matter *as provided for by its rules and regulations,* patent lands as falling within the terms of these grants, *such action is necessarily determinative* of the character of the lands patented!"

All through the opinion of the secretary we find constant reference to the fact that it is his duty to investigate *and decide.* The contention of the defendant railroad company apparently is that if a secretary of the interior with the connivance and consent of the railroad

company, neglects or refuses to perform his duty, and issues, on its application, without proof, without examination, an excepted patent, that the patent is conclusive and carries the mineral land, and that the ordinary rules of *particeps criminis or in pari delicto* do not apply to a railroad corporation! That is the concrete proposition, that the corporation may take advantage of the violation of the law made possible only by its own acts! We think not. (*U. S. v. Moffitt, supra.*)

This opinion was written some ten or twelve years after the application for the patent under present consideration, and, although copious reference is made to the *Barden* case, it is to that part that treats entirely of how and in what manner a patent should be issued, namely, after examination and investigation. If otherwise, the secretary would have surely pointed out that the rules in force ten or twelve years after the patent issued did not contemplate any disagreement or noncurrence with that portion of the *Barden* case reading as follows:

> "The government cannot be reasonably expected to issue its patent, *and is not authorized to do so, without excepting mineral lands,* until it has had the opportunity to have the country, *or that part of it* for which the patent is sought, sufficiently explored to *justify this declaration* (Note: What declaration?) *in the patent* and it would be deemed as a determination that no mineral lands existed therein."

As the secretary said, he was trying to follow the *Barden* case by making up and issuing a patent that would comply with the *Barden* rule of examination, determination and expression.

Judge Ross says a patent is conclusive in the boundaries of a mining claim. This court has held to the contrary, as we will later show, but whether that observation be true or not, a patent is not conclusive of the boundaries of a railroad grant or of a Mexican grant, and a patent to the railroad company may be assailed in such instances whenever the true fact is shown.

Sanger v. Newhall, supra.

It cannot be successfully contended that the examination and determination so often referred to simply means there should be such only when there is a real contest between parties before the department, for the department has full authority on its own motion or at the instance of others to inquire into and determine the quality of the public lands.

Quinby v. Conlan, 104 U. S. 420;
Marquez v. Frisbie, 101 *Id.* 476;
Iron S. Min. Co. v. Campbell, 135 *Id.* 286.

In the court below counsel presented some fifty authorities which at first blush may seem disconcerting, but if the

court will have the patience to briefly look at each of them it will be found that while they are cited on the proposition that a patent is conclusive, it will be quickly seen that in each and every instance it is held, conversely or inversely, but always clearly directly, that a patent is conclusive only after an examination of and actual determination affecting the subject-matter. We will briefly digest them for the convenience of the court, and if our digest be fallacious, counsel will undoubtedly be heard.

1. *U. S. v. Winona, etc. R. R.*, 67 *F.* 948:

It was said in this case that the test of jurisdiction is whether the tribunal has power to enter upon the inquiry, *not whether its conclusion is right or wrong.*

In that case there was a complete examination and actual adjudication of the facts.

2. *French v. Fyan*, 93 U. S. 169:

Complete examination and actual decision on facts before issuance of patent.

3. *Steel v. Smelting Co.*, 106 U. S. 447:

Ibid.

4. *Heath v. Wallace*, 138 U. S. 573:

In which the court held that the quality of the lands was a question of fact determinable by the land department, and the case *shows* there was a complete *actual* determination of the quality of the land after examination prior to the issuance of the patent.

5. *Scott v. Lockey Investment Co.*, 60 Fed. 34:

Here was in instance where a stranger sought to attack an argicultural patent on the ground that the land was known mineral land at the time of patent and there had been *an actual complete determination before patent that the land was agricultural.* As the court expressly says, the conveyance was made as agricultural, and that closed the incident so far as a stranger was concerned, and the patent in the case well shows the expression of quality, etc.

6. *Carter v. Thompson*, 65 F. 329, a case much cited by the defendants in the court below, was one of a mining title contesting with a prior townsite patent, one that had issued twenty years before. The court held and the record showed a complete finality in the land office prior to the issue of the earlier patent, and consequently was not subject to attack by a stranger.

7. *U. S. v. Winona*, 67 F. 948, it appeared that all the antecedent questions relating to railroad company under a land grant had been specifically passed on by the land department and that the adjudication of these questions was complete, and that while these decisions may be voidable they are not void. We surely have no quarrel with that case.

8. *Buena Vista Petroleum Co. v. Tulare Oil & Mining Co.*, 67 Fed. 226:

A state patent issued and thereafter defendants located the land on the ground that the land was mineral and it appeared from the record that the state had properly selected the land under a grant and that the selection had been approved by the secretary of the interior as required by law and that the certified list issued to the state was equivalent to a patent. There had been a complete actual determination and finality.

9. *U. S. v. Mackintosh*, 85 F. 333:

After a complete investigation the secretary formally decided that the lands were desert, and the court simply held such an *adjudication* could not be impeached in the manner sought.

10. *N. P. R. R. Co. v. Soderberg*, 86 F. 49 (affirmed 188 U. S.):

The court held the controverted land was mineral, being a granite quarry, and that it did not pass under the grant. That was the sole ground of decision.

11. *Cosmos Ex. Co. v. Gray Eagle Oil Co.*, 104 F. 20:

A decision that questions of fact which have been passed on and actually decided by the secretary of the interior are not reviewable by the courts, which proposition we cheerfully endorse. It is also the ruling in the cited case of *Catholic Bishop, etc. v. Gibbon*, 158 U. S. 155, which was a contest fought out from the local land office to the department of the interior.

We are frank to say we do not understand why counsel for the defendants should go to the trouble of gathering these authorities for us, as they all squarely uphold our position, as do the similar cited cases: *Neilson v. Champagne Co.*, 119 F. 123; *New Dunderberg v. Old*, 79 F. 598-607; *James v. Germania Iron Co.*, 107 F. 597-618, a case where there was complete hearing and determination of the land, and which determination the court held could not be collaterally attacked; *Janes v. Wilkinson*, 42 Pac. 737, which simply points out the rule that a merely voidable patent may not be attacked collaterally

by a stranger to the title; *King v. McAndrews*, 111 F. 860-874, another example of complete examination and determination previous to the issue of patent; *Noble v. Union River Logging Co.*, 147 U. S. 165, where it was simply held the *approval* for a right of way over public land under the Act of March 3, 1875, could not be attacked collaterally; *Hartman v. Warren*, 76 F. 157-164, in which case it had been determined by the land department that Warren was a Chippewa Indian, and the court only held this racial finding could not be impeached collaterally; *Deweese v. Reinhard*, 61 F. 777-781, on contest went through the local and general land offices and to the secretary of the interior, who rendered a final decision on a question of fact, and the court held this decision could not be attacked collaterally; and the same identical ruling was made in the remaining cited cases, namely:

Peabody, etc. v. Gold Hill, 111 F. 817;
Bear v. Luse, Fed. Cases 1179;
Oregon Trunk Co. v. Deschutes, 172 F. 738;
Lee v. Johnson, 116 U. S. 48;
Sparks v. Pierce, 115 U. S. 408;
Meader v. Norton, 11 Wall. 442;
Johnson v. Towsley, 13 *Id.* 72;
Silver v. Ladd, 7 *Id.* 219;
Warren v. Van Brunt, 19 *Id.* 646;
Moore v. Robbins, 6 *Otto* 530;

Shepley v. Cowan, 1 *Id.* 330;
Marquez v. Frisbie, 101 U. S. 475;
Bohall v. Dilla, 114 *Id.* 47;
Maxwell v. Land Grant, etc., 121 *Id.* 380;
Knight v. U. S. Land Assn., 142 *Id.* 161;
Monroe v. Becker, 147 *Id.* 47;
Duluth v. I. R. R. Co., 173 *Id.* 587;
In re Emblen, 184 *Id.* 660;
Manning v. S. J. Tin Co., 9 *F.* 727;
Campbell v. Weyerheuser, 161 *F.* 332.

It creates surprise that counsel should cite a multitude of inapplicable cases of attack collaterally on voidable patents by a stranger, issued after a complete examination and determination of the subject-matter by the land department of the quality of land of which the United States was solely the owner at the time of the issuance of the patent. None of the citations contravene, but all uphold, the rule of the *Barden* case! *Examination, actual determination and expression in the patent of the non-mineral quality of the land.* And *if the mineral exception be valid,* the cases cited could in no event affect this suit, even if all hostile, as in that event the legal title of the mineral land would *not pass* from the United States under the patent. None of the text book writers, not even Mr. Lindley, claim that the character of the land is determined by the *mere issuance* of a patent, un-

less it issued *"pursuant"* to the agricultural or mining laws, as the case may be, and Mr. Lindley, whose ever rallying point is the *Cowell-Lammers case*, and who overlooks entirely the only point in the *Gale-Best* case applying to this question of an excepted patent, observes at section 779 of his book:

"This rule (conclusiveness of patents, *i. e., Cowell v. Lammers*), when invoked in a certain line of cases, *seems to have lost some of its force, if it is not altogether ignored.* Take, for example, the case of a patent for a placer claim within the limits of which it is asserted that a lode exists whose existence was known at the time the placer patent was applied for, and which was not embraced within the placer location. The courts hold in such instances that the patent is not so conclusive that the land is placer in character as to prevent the owner of the known lode from defeating the operative force of such patent in *an action at law*, by showing the facts as to the existence of such lode and the knowledge thereof by the placer claimant."

In view of the recent decision of the California Supreme Court (June 6, 1911) in *Van Ness v. Rooney*, 160 Cal. 131, the reasoning of Mr. Lindley is shown to be utterly fallacious.

"So," he says, "with a townsite patent," etc., etc. The point of this section which was cited by the defendants in the courts below is that the very rule that the defendants contended for is, according to Lindley, *ignored* by the Supreme Court of the United States, as he was evidently referring to *Reynolds v. Iron-Silver Mining Co.*, 116 U. S., *and kindred cases.*

The concluding proposition urged by the defendants in the court below in this phase of the suit was that because it was not alleged that the patent issued in violation of any rule or regulation of the interior department or that the application of the railroad company did not comply with all laws and regulations in the subject, the suit must fail.

There is *no special demurrer* in the record and bill over and over charged that the patent issued without the jurisdiction of the land department and wholly without authority of law, etc. (Paragraph 17 of bill.) It is true, as stated by counsel, that the rules born July 9, 1894, expressly provided that lists prepared prior thereto should be excepted from their operation in instances where the said lists had been prepared in accordance with *any* rule, regulation or instruction of the secretary of the interior but as a matter of fact, and counsel will not deny it, the Madden application did not in any

way comply with the rules or regulations of the interior department in force at the time of the application which required proof of the non-mineral character of each 160 acres of land and simply saying "they were non-interdicted mineral lands" for if on such a record the validity of the patent is claimed it necessarily follows that the presumed "adjudication" which followed is a determination that on such a record the patent should issue, *the same is a conclusion of law* and not an adjudication or determination of a question of fact that is conclusive, but as a mere legal conclusion is subject to attack and to review in the courts, for as the Federal Supreme Court has said:

> "While the decision of that fact (of occupation and cultivation by a settler) may be conclusive as between the parties (to the contest in the land office), his ruling that occupation and cultivation created a claim exempting the land from the operation of the land grant is decision on a matter of law *which* does not conclude the parties and *is open to review in the courts.*"
>
> *N. P. R. R. Co. v. Colburn,* 164 U. S. 383.

In this connection we urge that if it be held that the ruling of the secretary of the interior was that an excepted patent issue, on the record before him, that it was a ruling of law not justified by the record and is subject to review by the court in this suit.

And in connection with the question of the mineral exception let us examine the land office case of *Courtright v. W. C. R. R. Co.*, 19 L. D. 410, relied on by defendants, where it was held that while the inclusion of the mineral exception was legal and lawful it did not confer on the department authority to make the necessary examination and determination after issue of the patent for when a patent issued, wrongfully or rightfully, the jurisdiction of the land department ceased, and the secretary went on to say:

> "The exception contained in the patent went beyond giving expression to the intent of the statute as construed by the Supreme Court, *and added a restriction upon the grant* which is not to be found in the granting act."

Just how a restriction on the grant was created by *excluding unknown mineral* lands is not apparent to the writer in view of the fact that such lands were precluded by the grant! Counsel did not argue the citation! This is the error into which Judge Ross fell and on which he based his decision in the court below. They simply submitted it without comment and passed on. A restriction on a grant cannot be created except in a manner pointed out in the Shaw-Kellogg case by Justice Brewer, and consists in *withholding*, for instance, *"unknown"* mineral lands when only "known" mineral lands

are precluded from the operation of the grant? We are convinced the very able counsel for the demurring defendants do not attach any particular importance to that particular land office decision, which distinctly says that the railroad title to the lands is *evidenced by the* grant *and* that a patent is unnecessary. If counsel will so agree and this court so hold this case might quickly and satisfactorily (to us) be disposed of.

In the court below combating the validity of the mineral exception and asserting that the patent was conclusive and that the court must assume every necessary required fact in order to uphold the patent, counsel made references to debates in congress concerning the joint resolution of June 28, 1870. It seems that the court reached the conclusion, from the portion of the debate furnished, that the joint resolution did not authorize of itself the insertion of the mineral exception and it is equally certain that the court did not reach its conclusion from the context of the law, but solely from the reading of the debate.

This appellant did not predicate his suit, in so far as the mineral exception is concerned on the joint resolution of June 28, 1870. His contention was, and is, that the exception was authorized by the grant and but gives expression to its intent. *The phase of his suit now under discussion* is based on the Act of

July 27, 1867, *and the rule in the Barden case requiring the insertion of the mineral exception in patents issued without examination or determination as to the quality of land embraced in the patent.*

Complainant, however, conscious of his limitations, asked for a construction of that resolution as the patent recited that a grant of lands was made to defendant railroad by and through *that joint* resolution and the granting act of July 27, 1866 of twenty sections of land per mile of road *independent of its mineral or non-mineral quality,* of odd numbered sections *within the limits* of twenty miles and if the land office construction that land to the aggregate of a definite number of sections *means double that number,* on either side of the track, *it would mean,* according to the language of our patent, twenty sections on either side of the track *within* the limits of twenty miles therefrom, which would be an impossibility as a limit of forty miles each way would be necessary to sustain the land office construction.

The land decisions cited in the portion of the congressional debate furnished by defendants in the court below was limited to instances of "actual settlers," but in addition to "actual settlers" and the saving of their rights, the resolution adds: *"Together with the other conditions and restrictions provided for in*

the 3d section of the Act of July 27, 1866," and that section, in addition to settlers, homesteaders and pre-emptors, whose rights are saved, *expressly saves the mineral land.* Now, what other condition or restriction is to be found in that section? And if no other can be found, must not the resolution necessarily be held to mean that the other conditions and restrictions refer to the *saving of the mineral lands?* Of course, we are aware that counsel will contend that nothing must be "assumed" against the railroad corporation, but counsel must remember that the mandatory rule of construction in these cases does not permit the court to "assume" in favor of the grantee. Otherwise, *there are no "other conditions and restrictions"* and the whole resolution is meaningless after the words *"actual settlers."* We think, however, that the court erred when it held that the "other conditions and restrictions" did not authorize a reservation of mineral lands, but that such exception should include likewise a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of grantee's railroad was designated by a map filed in the office of the commissioner of the general land office.

It will be seen by referring to the "certificate of approval" (appendix

p. 456) that the land office did "expressly save" the mineral lands in controversy by *"excluding"* them from approval and from transfer under the patent about to be issued under the certificate.

The view of Judge Ross cannot be maintained for the reason that all claims, except mining claims, would be barred which did not exist at the time of filing of the map of definite location and for the further reason that all of such claims, *except mining claims,* would be standing of record *in the local land office at such date or would be barred,* while there was no provision of law that required *or permitted* the recordation of mining claims *in the local land office* and the right to make mining locations was a right, as pointed out in the *Barden* and *Sanders* cases, *that was reserved* out of the grant up to the *time of the patent*, even up to the day before any of these "unknown" claims, *could only be saved by the mineral exception,* and consequently it would not be necessary, as said by Judge Ross, to except all the other claims and rights in the patent *as they* would appear *in the records of the land office* and be brought to the attention of the secretary of the interior and would not require, saving in a patent that could not issue until after the map of definite *location was filed,* and consequently the writer thinks that under the joint resolution it was the duty of the secretary of the interior to cut out of the lands all pre-emption and

other claims of right appearing *of record in the local land office at the date of the filing of the map of definite location* and then the only remaining "condition" or "restrictions" to save were *known mineral claims and rights* which might be existing at the time of patent, and the unknown mineral lands could only be saved by the "exception of all mineral." Such was the contention and action of the department of the interior for forty years and the secretary of the interior is now following such construction. In no other way may force be given to the language of the joint resolution after the words "actual settlers," and the rule of construction of these matters as laid down in the *Soderburg-N. P. R. R. Co. case in* 188 *U. S.*, makes it necessary for the court to resolve all doubts against the railroad claimant and not, as counsel say, to assume and presume any and everything that may be necessary to save the grant to the railroad company.

It was the policy at that time, and had been for forty years previously, to insert reservations in patents! The right to do so had been recognized for nearly a half century *and it must be presumed that the lawmakers knew of such policy* and the sole purpose of the joint resolution was that the railroad company should not secure what in *law or in equity belonged to someone else*, the pilgrim of civilization, the actual settler, or prospector.

But suppose Judge Ross is right in his contention that if the joint resolution made it necessary or at least authorized the insertion of the mineral exception all other rights and claims should be reserved in the patent. *Well, why not?* Is there anything unreasonable or illegal or improper in such a suggestion? Is there any legal or moral reason why the patent should not carry all the conditions set forth in the joint resolution? The fact the patent at bar carried only the mineral exception proves nothing for patents were not issued to the Southern Pacific Railroad Company until many years *after* the filing of the map of definite location and of course the filing of the map of final location cut off all other claims, and the only remaining interest to be saved *was known and unknown mineral lands.*

Suppose that in face of an agricultural filing or mineral application for patent pending in the local land office patent should issue to the defendant railroad company? Of what avail would it be, excepted or unexcepted?

Nowhere in the opinion or in the debate furnished nor in the land office decisions cited below by counsel is there any intimation as to the particular method by which the rights of actual settlers could be saved and the "other restrictions and conditions" of the granting act saved and preserved. The "actual settler"

had a clear way marked out for him; he could prove his right and then the secretary could cut the land out of the granted area. The preemptor and homesteader, being holders of record of their respective lands, did not need any further protection than that accorded by the Act of July 27, 1866, while the "actual settler" referred to was without record protection. But suppose that instead of "securing the rights of actual settlers" by the method indicated he passed the entire area of every odd numbered section within the limit of twenty miles to patent, inserting therein the exception contained in the exact language of the joint resolution: "Excepting and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the 3rd section of the Act of July 27, 1866, including mineral lands, should any be found in such tract, except coal and iron lands. Suppose a patent should issue for land known to the secretary to be mineral but that the owner was content to stand on his location and discovery, would an exception in a patent to the defendant railroad company OF THAT PARTICULAR CLAIM be nugatory and would the patent be conclusive the mining claim did not exist? Instead of the claim being designated, the patent excepted "all known mineral lands" would not the mining claim be excepted? Now, how could the secretary save the other conditions and restrictions, i. e., UNKNOWN

MINERAL LANDS except by an EXCEPTION OF ALL MINERAL LANDS?

Will it be contended that such an exception would not give expression to the intent of the joint resolution?

So we submit there is no terrible possibility conjured up by the thought of the inclusion of all the conditions in the supposed exception, and it is apparent that the reasoning of Judge Ross flowed from his basic error that in some way the exception would *limit or diminish* the grant of July 27, 1866.

The joint resolution is set out in full at page 457 of the appendix, and upon reading it will be seen that it says:

> "It shall be the duty of said secretary of the interior to cause patents to be issued * * * expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27, 1866."

By a reference to the third section of the act referred to it will be seen that the other conditions and restrictions provided for read as follows:

> "Provided, f u r t h e r, that all mineral lands be and the "same are hereby excluded from the operation of this act, and "in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections adjacent to

the land of said railroad, and within twenty miles thereof may be selected as above provided."

That is the only other condition or restriction appearing in addition to the reservation and saving of all the rights of actual settlers.

A sharp controversy arises between the complainant and defendants as to the meaning of this phrase, and as to its grammatical construction, the complainant contending that the adverb *"expressly"* modifies the words "saving and reserving" and the adverbial phrase "saving and reserving" modified the word "patents."

The defendants evidently appreciating the force of this contention makes a sharp attempted distinction, and on page 152 of their brief said, "The term 'expressly' *refers to the joint resolution, not the patent,* but it is upon the term 'expressly' that complainant relies; but even in that respect the conclusions of complainant would not follow for 'expressly' would mean by metes and bounds, areas definitely ascertained, not a general, indefinite, uncertain exception."

No authority, grammatical or otherwise, is advanced by the defendants for such extraordinary construction and to our mind it is based solely upon the

necessities of the occasion. We contend that under no form of construction can it be accurately contended that the word *"expressly"* refers to the joint resolution and *not to the patent.* And if it be admitted, as we think it must be, that the only proper construction of this statute is to hold that the term "expressly" refers to the patent and not to the joint resolution as contended by the defendant, it necessarily follows that it was the duty and it is the law that patents should issue containing an exception of the other restrictions and conditions provided for in the third section of the granting act and that condition solely is, that mineral lands shall be excluded from the operation of the grant and shall be saved by exception and reservation in the patent. The defendant railroad company at every point is forced into an unnatural construction for it must be evident that the secretary could not "expressly save in the joint resolution," he could only "expressly save in the patent," and just how the secretary was "expressly" to do anything in regard to the joint resolution except to obey its terms and to carry its terms into the patent is not apparent.

If, as contended by counsel, that the term "expressly" refers to the joint resolution it is evident that it would be impossible for the secretary of the interior to expressly or otherwise save and reserve the mineral

rights referred to in the 3rd section of the granting act. If the word "expressly" refers as we contend to the patent, it is clear that it authorized in obedience of the granting act the inclusion of an exception of unknown mineral lands or mineral rights, not then known to the secretary of the interior, in the patent.

This is evident because of the fact which must be admitted by the defendant that, at the time of the *issuance of the patent* it would be impossible for the secretary of the interior to have any knowledge of the character of lands that might be mineral that were to be included in the patent, as he could have no constructive knowledge of the existence or non-existence of mineral lands in the lands granted under the Act of June 27, 1866, except as he was bound to know by the recordation, until he had had an opportunity to investigate the condition and the character of the lands lying within the primary limits of the railroad land grant. He could and did have actual knowledge *of the rights of settlers* existing at the time of patent, for the record of those settlers' rights must have appeared in the local land offices at the time of the filing of the map of definite location, and unless they appeared there at that time those rights would have been lost and, under the granting act, the lands occupied by actual settlers who had not made application for the purchase in the local land

offices would have passed, under the terms of the grant, finally and forever to the railroad company, but, under the provisions of the various mining acts it would be impossible for those rights to appear of record in the local land office until such time as the applicant for purchase had appeared there, and in proper proceedings initiated his application for a patent to the lands which he might have held even prior to the passage of the railroad grant act many years before, and, furthermore, there is no law and there never has been a law requiring a mining locator to make an application for a patent, and until, for reasons of policy or otherwise, he had made such application, no record of his mining location or of his mining rights could have been filed or appeared in the local land office, and, in closing the discussion relating the question of the validity of the mineral exception it will be opportune to discuss, in detail, the opinion of Judge Ross in the *Roberts* case, which, as he stated in his memorandum (appendix, p. 445) contained his reasons for sustaining the demurrer in this suit.

Analysis of the opinion of Judge Ross.

1. It will be noted the opinion was rendered in the suit of *Roberts v. S. P. R. R. Co.*, and not in this suit and the opening remark that the pleadings are filled with irrelevant and redundant matter refers solely to the

Roberts suit; in that suit there was a general demurrer, a special demurrer with many items and a motion to strike with fifty-two items, while in this suit there is only a general demurrer.

2. In the second paragraph Judge Ross points out that the *Roberts* bill of complaint specifically allegel that the *legal title passed* under the patent while we allege in our bill of complaint that it did not and the *Roberts bill* asked the court to protest their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patent which was issued by the government and which they expressly alleged *conveyed the legal title to the land to the grantee named therein.*" Ours was a simple suit to quiet title under the added jurisdiction conferred in the federal courts under section 738 of the California Code of Civil Procedure with averments essential to a direct attack under which a person in or out of possession may institute his action to determine claims concerning real property against a person in or out of possession of the lands and the equity rule in the federal court was satisfied in this instance by reason of the fact that the defendants *were not in possession* of any part of the controverted lands at the time of our entry or at the time of the filing of this suit.

Neither did we seek "some sort of injunctive process" or did we seek

to "control" a patent "that passed the legal title" and consequently the opinion of Judge Ross in such particulars refers not to us but to the unfortunate Roberts suit which was heard at our argument and, which it appears, involved us in its confusion and misdirection.

Following such statement Judge Ross said:

> "* * * Neither the government, nor any one in privity with the government title, is here complaining. The suit is by strangers to that title, *for by* the express averments of the bill, the complainants of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patent *which they expressly allege conveyed* to the railroad conveyed *the legal title to the lands.*"

Roberts simply stood on the mineral exception; he did not allege a prior segregation of the land he claimed by reason of previous recorded mining locations.

We have no contest with Judge Ross concerning the correctness of such a rule but the misfortune is, and his error was, that he made that ruling the basis of his decision in this suit in which *it is expressly and repeatedly alleged* that the legal title to the lands *remained in the United States* under every aspect of our suit, and we are necessarily constrained to believe that Judge Ross assumed our suit was

identical with the Roberts suit which it resembled in *not* one single instance or allegation!

And using the foregoing as his *predicate* Judge Ross goes on to say:

> "That the complainants cannot be heard to complain of the alleged frauds upon the government is so thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands.
>
> "*The only* real question, therefore, in the case is whether the lands in suit are excluded from the patent by reason of the alleged subsequent discovery of mineral their by (Roberts) complainants under the exception clause inserted in the patent."

We admit, without reservation, that the reasoning of Judge Ross so far as he passed on the Roberts suit in such regard was absolutely right and have so contended. The Roberts suit was *based* on the proposition that while the legal title passed to the railroad company under its patent, nevertheless, a subsequent mineral location would have a retroactive effect and would defeat the grant and the patent which in the same breath they alleged passed the legal title! Judge Ross might have rested at this point but in seeking for grounds to destroy in every instance the effect of the mineral exception he fell into divers error, and it is evident that ever in his subsequent citation he had ever in mind the

case of a stranger seeking to "cancel" or "control" a *legal title* by reason of a subsequent trespass on lands to which they were in no way privy, and to which the legal title had passed away from the United States.

Judge Ross then proceeded to say:

> "Where did the officers of the government, charged with the duty of issuing patents for lands granted by congress get authority to cast upon the courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which congress devolved upon the land department *as a prerequisite* to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of congress of June 28, 1870."

It may be said at this point that the Supreme Court of the state of California in many instances, and at the time when Judge Ross was a member of that court, held that such duty was cast on courts by reason of the law and the fact and Judge Ross in his own independent language in *McLaughlin v. Heid,* 63 Cal. 208, said this particular *mineral exception* was a part of the description and that a subsequent mining locator by making a discovery of mineral could thus avoid the grant and patent, and that such duty may be cast upon the courts has been so de-

cided by this court as elsewhere pointed out in this brief.

Then Judge Ross devoted some space to the history of the Southern Pacific Railroad Company and passing on *no* question except the validity of the insertion of the mineral exception proceeded to fully discuss from his viewpoint the effect of the joint resolution of congress of June 28, 1870. Previously herein we have fully presented our views concerning the said joint resolution and leave it without further comment.

Coming down to the *Barden* case, Judge Ross said, after citing therefrom:

> "The observation that 'the government cannot be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral land, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent' is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the land described in the granting clause thereof, all mineral lands."

We are keenly conscious at this point of the poverty of the English language but at that we will continue to assert that when this court says that the United States

is not *authorized* to issue a patent for unexplored and undetermined land, without excepting mineral lands, *that it must be apparent that it is legal for the United States to insert such a mineral exception in a patent issued in such instance.* No other meaning may be extracted from the language. It is incapable of any other construction and Judge Ross necessarily was forced to say:

> "The court *could not* so have decided in that case, for there was no such question before the court, and could not have been, as no patent had been issued in the case thereunder consideration."

Heretofore in this brief we have shown that the questions of patent form, issuance and finality were fully before the court and such fact has been recognized in more than fifty subsequent cases in which the *Barden* decision has been cited.

And then Judge Ross even while claiming that the reference in the *Barden* case to patents was *obiter dictum* went on to cite many pages of the *Barden* case solely relating to the effect and force of patents and setting forth the lengthy citations in that case to the *Kemp case*, the *Steele case*, the *Heath-Wallace case*, the *Valentine land office case*, all of which *were confined to a discussion of patents*, closes the citation of the *Barden* case with this reference to a portion of the same relating to the force of a patent:

"Until such patent is issued, *defining the character of the land* granted and *showing it is non-mineral, it will not comply with the act of congress* in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral land; but a patent issued *in proper form upon* a judgment rendered *after due examination* of the subject by officers of the land department charged with preparation and issue, *that the lands were not mineral,* would, unless set aside and annulled by direct proceedings, estop the government from contending to the controversy and as we have already said, *in the absence of fraud* in the officers of the government, would be conclusive in subsequent proceedings respecting the title."

It must be apparent to this court that Judge Ross entirely overlooked the fact that the patent contained *no* jurisdictional recitals or any statement "defining the character of the land, showing it was non-mineral" and had in mind a perfect patent burdened with a mineral exception.

Is there such a perfect patent to be found in this suit?

Judge Ross then said:

"I do not find in this language of the prevailing opinion in the *Barden* case any support for the contention of complainants' counsel that the officers of the land department were required or authorized to insert in the patent here in question

or in any other similar patent, after describing the lands falling within the railroad grant a clause 'excluding,' etc. And that the Supreme Court itself takes the same view of the decision in the *Barden* case, is, I think, shown by its reference thereto in the case of *Shaw v. Kellogg*, 170 U. S. 313, when at page 339 it says."

Before taking up the *Shaw-Kellogg* citation it will be noted by this court (1) that the patent in the Roberts case is the one under consideration here, the lands being different in description only, and (2) that Judge Ross nowhere in his opinion alludes to the necessity of including in the patent a statement of the quality of the land in order to make the patent conclusive and (3) that he cites the *Shaw-Kellogg case* as authority for what a patent should not contain, although no patent was under consideration in that case and although the granting act passed on in that case *passed* to the title directly by the grantees *and did not provide for a patent!* It is only when a patent is provided for in grants *in praesenti* that the legal title remains in the United States; when no patent is provided for as in the case of *Shaw-Kellogg*, the legal title passes *in praesenti*.

The *only question* decided in the *Shaw-Kellogg* was that *after final examination and adjudication of the quality of land* by the tribunal vested by congress with

authority to pass on that question, *and over which the courts had no jurisdiction to revise,* the grant of the same could not be defeated by a *subsequent discovery* of mineral—that after such examination and adjudication, in an instance where a patent was not authorized, it was unlawful to make any notation on the records of the land department that might subsequently affect the title, all of which is admitted by us.

Long after the title passed to the grantees indicated in the act passed on in the *Shaw-Kellogg case,* and after repeated detailed examination of the land granted, which as Mr. Justice Brewer pointed was limited to lands which did not contain *known mineral lands,* and that the grant as a *whole* must be entirely *free* from all *known* mineral lands, after complete and formal decision by the land office that the land was not mineral and after it had passed away from the original grantee an attempt was made to defeat the *grant* by showing a subsequent discovery of mineral *before the issuance of a patent,* the subsequent locator claiming that under the *Barden* case a location under the mining laws of the United States could be made at any time subsequent to the grant *and up to the issuance of a patent* but this court met that contention by pointing out that under the so-called Baca grant there was no provision for a patent *and that the legal title passed under the grant!* and that the right to

make a mining location ceased when the surveyor general and the land department *finally* determined the land was non-mineral and consequently a *subsequent* mineral discovery would not defeat the *final* action or determinal of the proper tribunal that the land was not mineral. The subsequent locators claimed that a mining location could be made, as said in the *Barden* case, at any time up to the issuance of a patent and claiming that there could be no "finality of determination of the quality of the land until a patent issued defining the quality of the land" claimed, that a mineral discovery made after the action of the surveyor general and land department and up to the time the patent issued would defeat the Baca grant, but this court decided that a patent not being authorized by the Baca grant the claim was untenable as the action of the surveyor general and the land department in determining the quality of the land was equivalent to a patent and that a discovery of mineral subsequent to that time would not defeat the grant and that a notation on the plat to the effect that all mineral lands were to be excepted was nugatory *because* after full and complete examination it had *finally* and actually decided that the *lands as a whole* were wholly agricultural and not mineral and that formal adjudication ended the matter!

The citation made by Judge Ross to the *Shaw-Kellogg* case was of

that portion of the opinion which *(referring to a patent)* cites the *Barden* case as saying:

> "But there was no decision of opinion as to the question when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

All of which is very true but in connection therewith it must be noted that Mr. Justice Field and his assenting colleagues were referring to and had in mind a perfect patent founded on a perfect record—a patent issued after examination and adjudication with a statement of the quality of the land, a *patent with proper recitals* and not a patent, without record, statement or recitals like the one standing at the bar of this court.

Then Judge Ross said:

> "I am also of the opinion that the case last referred to— *Shaw v. Kellogg*— is direct authority for the proposition that the officers of the land department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause 'all mineral lands, should any such be found in the tracts aforesaid.'"

The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of congress passed *June* 21, 1860, (12 *Stats.* 71), in settlement of a claim under a Mexican grant

to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected and the courts could exercise no jurisdiction in the matter. The grantees made their selection and applied for the land. Certain correspondence occurred between the land department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the land department instructing the surveyor general to approve the selection and make a survey thereof. *The land department subsequently approved the survey, field-notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of section 6 of the act of congress approved June 21, 1860,"* which, as has been seen, excluded mineral land from the grant. *The act of congress did not provide for the issuance of a patent,* but the land department noted on *its maps that this tract had* been segregated from the public domain and had become private property and so reported to congress, which never questioned the validity of such action. The

grantees were also notified and took possession of the land.

Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

> "These contentions are that congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; *that no patent has ever been issued,* and therefore the legal *title has never passed* from the government; that the land department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

It will be noted at this point that this portion of the Shaw-Kellogg opinion is simply a statement of the claims of the subsequent discoveries of mineral who evidently overlooked the fact that the title in that case passed by grant and *not* by patent.

In considering the limitation undertaken to be imposed by the land department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field-notes and plat thereof, the Supreme Court said:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of the opinion that the insertion of any such stipulation *and limitation* was beyond the power of the land department. Its duty was to decide and not to refuse to execute the will of congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. *The general statutes of congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the land department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title*

should fail? The Baca grant was similar to pre-emption, homestead and townsite locations in that the land as a *whole* must be non-mineral and *known* mineral in any part of the land avoided the grant, there being no lieu provisions. Before any title could vest in the Baca claimant or in a homestead, pre-emption or townsite claimant it had to be determined by the proper tribunal that the land was "not known" to be mineral at any time up to the time of final proof and when the matter was actually determined by the proper tribunal it was determined for all time, but this court has never disputed that an exception give the proprietor of a *mineral* vein the right to follow his vein into the patented homestead land, to burrow underground into the land embraced within the homestead patent was valid! and that, too, in face of the fact that a homestead patent carries title to the center of the earth. The distinction is obvious. The subject to be determined in this class of cases was the "known" mineral quality of the land at or before time of patent and as pointed out in the *Barden* case the rule applied in the *Deffebach-Hawke* and *Davis-Weibbold* cases do not apply to cases arising under railroad land grants and the rule that must be applied in railroad land grant cases is laid down in the *Barden* case and the fact is pointed out in the *Shaw-Kellogg* case in reference to the statement of the quality of the land to be inserted in a patent issuing under a railroad land grant. Mr. Justice Brewer grouped about the Baca grant the similar grants in homesteads, pre-emption and townsite grants which only preclude *"known"* mineral lands from their operation. He did not include or

refer to railroad land grants in illustrating his statement that such grants could not be limited or diminished by future discoveries of mineral, or by excepting the patent in those cases with a provision excluding all mineral land from their operation. It cannot in that way avoid the responsibility of *deciding* and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffebach v. Hawke, supra,* 406:

"'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land officers, who are merely agents of the law, had no authority to insert in the *patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.*'"

The court will notice what was probably one of the ideas that controlled the decision of Judge Ross, namely, this extract from the *Shaw-Kellogg* case:

"The general statutes of congress in respect to *homestead, preemption* and townsite locations provide that they shall be made on lands that are nonmineral, and in *approving* any such entry and issuing a patent therefor could it be tolerated for the moment that the land department *might limit the grant* and qualify the title

by a stipulation that if thereafter mineral should be discovered the title should fail."

In answer it will be seen:

1. The court speaks of an antecedent *approval* of the entry.

2. That the rule referring to townsite cases, like the *Deffebach-Hawke* and *Davis-Weibbold* cases have no application to cases arising under the railroad land grants—that is clearly stated and stated positively and without reservation in the *Barden* case: the first excluding the entire entry if not *wholly* non-mineral and the latter only excluding mineral legal subdivisions. This court will remember that there no "lieu land" provisions in the cases of homestead, pre-emption and townsite cases and the land as a *whole* must be non-mineral!

3. The homestead and pre-emption laws gave a citizen the right to take up lands *not known* to be mineral at the date of entry.

4. The railroad land *grants* act of July 27, 1866, granted land *in praesenti* but excluded *known* and *unknown* mineral lands.

5. While a mineral exception in a homestead, pre-emption or townsite patent would be void *as it would create a limitation* of *known* mineral lands and thus limit the

patent to that extent, the same mineral exception in a railroad land grant patent *would not limit the grant* as evidenced by the patent as both *known* and *unknown* mineral lands were precluded from the operation of the grant and consequently an exception of "all mineral lands," known or unknown, *would not limit the grant* and simply gives expression to the intent of the statute, and in any event, it will be impossible to say, in any aspect of the case, that the mineral exception in a railroad land grant patent, diminishes or limits the grant under which it issued. Amongst other differences it appears that if mineral be found in any part of a homestead the whole of the homestead would be lost as Mr. Justice Brewer points out was the case in the Baca grant, while under a railroad land grant *nothing* would be lost to the railroad grantee—only the legal subdivision on which mineral was discovered would pass from the grant and a *like* lieu amount could be taken up elsewhere and consequently with the *lieu* lands at hand it would be simply impossible to *limit* or diminish the grant as under no circumstances was the defendant entitled to known or unknown mineral lands. There is not a single theory that will support the proposition of Judge Ross that the mineral exception could under any state of facts or under any conditions diminish or limit the grant and it necessarily follows that Judge Ross has no support for his conclusions. It must be

quite clear that this court did not have a railroad land grant patent in mind when the *Shaw-Kellogg opinion* was written about the Baca grant. The only reference by court or counsel in that case to a railroad land grant patent was when counsel contending for the mineral locators urged that until a patent issued, and that a patent must be issued under the Baca grant, mineral location could be made but the contention fell when this court held the title passed by the Baca grant and that there was in law no provision for a patent.

The court will observe how Judge Ross fell into error in assuming that the mineral exception of known and unknown mineral lands in the patent could possibly limit the grant that expressly precluded such lands from its operation.

Again the *Deffebach-Hawke* citation is equally misleading and fallacious.

The citation reads (*and is cited against us*):

> "The position that the patent to the plaintiff should have contained a reservation excluding from its operation *all buildings and improvements,* not belonging to him and *all rights* necessary or proper to the possession and enjoyment of the same has no support in any legislation of congress —the land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, *with recitals showing a compliance*

with the law and the conditions which it prescribed."

It will be observed:

1. The decision was made many years before the *Barden* decision and is fully distinguished in that case.

2. The opinion *Deffebach v. Hawke* says that patent *must carry full recitals* showing compliance with the law, and it will not be contended that this patent carries the necessary recitals.

3. That was a case where a placer locator had received a patent from the United States to land on which a townsite had been placed; the matter had been fought out in the land department and it was decided the placer locator was entitled to a patent and accordingly a patent issued which, under the placer mining law, carried full title *to all the surface* of the land *embraced* within the patent boundaries down to the center of the earth and the claim of the townsite claimant that buildings, building locations, streets, block and alleys and all rights relating to the possession of the same, etc., should be reserved for him and be taken away from the placer location is so utterly absurd that we were quite confident counsel will not cite it again as an authority against us.

Concerning these intertwined certified questions counsel cast various anchors to the windward in fretful hope that at least one of them would drag. For instance, counsel said: "In no instance has it been held that a mineral location deprives the land department of the jurisdiction to determine whether the land covered by such location is in fact mineral and whether in fact mineral has been discovered in sufficient quantity and character to justify its development and exploitation," but such investigation may only be had *upon a hearing and notice to the mining locator.*

We do question the elementary proposition advanced by counsel of the right of the department to *hear and determine all and any contests* relating to the public lands but we do claim there must be a hearing and determination in an *ex parte* proceeding resulting in a decision before a valid patent may issue in such premises, and the fact remains that the land is admittedly mineral and was known mineral land at time of the patent and has been examined BY THE LAND DEPARTMENT and determined to be mineral land of great value.

Then counsel said that while it was not contended that equitable rights may summarily be ignored, that congress can deal with the public lands of the United States as it sees fit. May be so, *but it cannot take away an*

unpatented, perfected mining location from the locator! While it may grant lands on conditions to be performed, *after the conditions are performed* it may not destroy the mining title. While a repeal of the homestead law might destroy unperfected homestead applications *the repeal of all the mining laws would in no way affect an unpatented perfected mining claim* any more than would the attempted sale, without notice, contest, hearing and determination of claimed and located mineral land to some predatory, agricultural railroad claimant, and neither would it be necessary for that mining locator, in case of either event, to find it necessary to impress on someone a trust affecting the violation of the law. He may ignore the patent and rest on his rights.

An action to enforce a trust, as vaguely intimated by counsel, *may be only* maintained in instances when the patent attacked by the antecedent claimant, *issued erroneously within the jurisdiction of the land department* and does not apply to void patents *issued without such jurisdiction* or to patents that do not carry the legal title. Counsel keep on forgetting the distinction, which is elementary.

(Gold Hill M. Co., v. Ish, 5 *Ore.* 104.*)*

Counsel then said: "If the ruling (known mineral lands) in placer cases were applicable to all land grants (for all land

grants except mineral) every patent, whether for homestead, pre-emption or school land, would carry with it an uncertain and indefinite exception of mineral land, with a corresponding invitation to contention and litigation, but the rule as to patents is, as we shall see later, directly to the contrary," and then a strenuous struggle follows to uphold the proposition which we have seen has been specifically repudiated in *saline, land grant, homestead, pre-emption, townsite and all other classes of patents,* and all the cases cited by counsel are simply a reiteration of those instances when prior to the issue of the patent there had been, in fact, a complete adjudication of the fact and the *patent had issued within the jurisdiction of the land department.*

Speaking of the *Sanders case,* 166 U. S. 620, counsel said the case is authority for the proposition that if the *mining claim has not* been filed in land office until after the railroad definite route map had been filed, the claim was not valid, which is untrue, as the case specifically stated that the right to make mining locations up to the issuance of the patent is the *one right reserved out of the grant* and then counsel make the absurd claim that the non-filing of such mining claim in the land office *prior* to the filing of the map of *definite location* operated to *deprive* the land department of its jurisdiction to determine whether the land is of the character

contemplated by the grant and this contention is made in the presence of the *Barden* and *Sanders* cases! What the *Sanders case* did hold about such an antecedent claim was that such a claim, a mining location on agricultural land, *even if invalid,* and so confessed, was nevertheless a "claim" that excluded the claim from the grant! A ruling from the land office is cited *(N. P. R. R. Co. v. Allen, 27 L. D. 286)* in which it was said:

> "A *careful examination* of the Sanders case seems to show that to except NON-MINERAL GROUND from the grant by reason of a claim thereto under the mining laws, the claim must have been one which has been asserted before the local land office and is pending of record there at the time the line of the road is definitely fixed," etc.

The distinction is obvious—a mining claim placed on *"non-mineral" land* in order to have segregated the land under *an invalid claim* must have been pending, etc. Will counsel *tell us how the successful mining location on which the Barden case is based was valid in view* of the fact that the mining location was not *made* until years after *the map of definite location was filed,* and that it never appeared in the land office? Or what becomes of the specific ruling in the *Barden* and *Sanders* cases *that the right to make a mining location on mineral land was the single right existing after the filing* of the map of definite location! How could the mining loca-

tion or the application in the *Barden* case have appeared in the local land office at the time of the filing of *the map of definite location* when the same was not made until years after the *map of definite location was filed?* Surely, counsel may not be serious in such contention but in the presence of the *Barden and Sanders cases* they asserted:

"It is not alleged nor claimed in the present case that there were any mineral locations of record in the land office affecting any of the land in suit at the time the Southern Pacific Railroad Company's map of definite route was filed in the general land office. It appears, on the contrary, that the prior mineral locations upon which complainant relies were not even made on the land until long after the company's map of definite route was filed and it is not alleged that such prior locators ever made any application to purchase the land from the government or even made any entry whatever in the United States land office." All of which was absolutely unnecessary.

4. Counsel then said it had been repeatedly held that a patent when issued is conclusive that the land was not known to contain any known mineral land, but we say the *"adjudication"* by patent is not conclusive in any event unless the fact had been *actually determined* and counsel saying there is a host of cases so holding only cited one, *Johnson v. Drew,* 171 U. S. 93, which *only holds,* as we have all along contended, that the *"judgment"* of the land

department *deciding* that the land was agricultural, saline, mineral *or not, presented a question of fact,* NOT RESTING on record, DEPENDENT *on oral* testimony, and that the *decision* of the land department *one way or the other* was conclusive. Of course! Suppose that not dependent on the record, but on oral testimony, uncontradicted testimony, the secretary should write a formal decision holding the land *to be mineral* and denying the application for a patent, *thereupon* issued the *patent at bar,* will it be contended that on such a record a patent *so issued* and written would create the conclusive presumption that the land was agricultural, that no mineral lands were known to exist, and that it carried the title and was not void?

Such is this case plus the exception! Of course, Mr. Lindley asserts, apparently but vaguely, to the contrary, but says the *rule is involved in confusion* and doubt. He admits that placer and townsite patents may be attacked but in regard to agricultural lands he takes the position:

> "that the only way to avoid the same in a bill in equity and that one owning a mining claim which, if *non-mineral,* would inure to a railroad company under a congressional grant, *cannot at law* attack a patent issued to such company by showing that the land embraced within the mining claim was mineral in character at the time of the railroad patent. The aid of the government must be invoked to vacate such a patent, *and until it is vacated*

it is a conclusive adjudication that the lands are non-mineral. A similar rule applies to agricultural patents. The owner of a 'known mine' within premises patented as agricultural cannot defend in an action *at law against such a patent.* The method of obtaining relief is the same as in the cases of railroad patents—a suit brought by the United States to set the patent aside."

The recent Van Ness-Rooney case (supra) absolutely disposes of this contention in every single particular.

The action in that case was instituted by a placer locator to quiet his title against a subsequent grantee of the S. P. R. R. Co. of land patented to that company under the land grant act *and the patent was held absolutely void.*

If this *Lindley rule* is true, what becomes of the many cases, the host of California and federal cases and iterated and reiterated contentions of counsel that in a private suit a prior mining locator could charge the fraudulent patentee as a trustee? In that instance, to start with, Lindley is *in apparent error.* In California, in defending an action of ejectment brought against him by the patentee he could maintain his *equitable defenses* and impeach the patent without the aid or suit of the United States!

Mr. Lindley is without state or federal authority in his view of the law; the text is suggestive of hasty determination and no authority is produced by the text writer to uphold his *own views*. What was the *Morton-Nebraska case* (21 Wall. 660)? There a patent had issued to an agricultural claimant for known mineral (saline) lands; and the patent fell! Fell in a suit instituted not by the United States, but by a private citizen. What has become of the rule of *Alford v. Barnum, Steele v. Hunt, Merril v. Dixon, Garrard v. Silver Peaks Mining Co., Hermocella v. Hubbell, Cole v. Best, McLaughlin v. Powell, Chi. Q. M. & M. Co. v. Oliver, S. P. R. R. Co. v. McCusker, Wright v. Roseberry, Van Ness v. Romey?* What becomes of this proposition: "The *public faith has become pledged to him and any subsequent grant of the same lands to another party is void* unless the *first location* or entry be vacated and set aside." Such was the general proposition argued or stated by the Federal Supreme Court in the case of *Wirth v. Branson*, 98 U. S. 118. It applies aptly to this location and suit. *Mr. Lindley* says, and he is the sole reliance of counsel, that an agricultural patent to a railroad company under a grant excluding mineral cannot be avoided by a prior mineral locator and the patent is not void! Well, let us go a step farther. Suppose that at the date of mineral location there was *pending in*

the general land office an application by a mineral locator to purchase the land and pending the application a *railroad grant patent issued?* Would the patent be conclusive as to the *non-mineral* character of the land? Yes, says Mr. Lindley. Counsel cannot say "Yes" because they have contended to the contrary from the commencement of this suit. Suppose the application was approved and a mineral patent issued to the locator and subsequently the railroad secured a patent! Could the mining patentee attack? No, says Mr. Lindley, but counsel have not expressed themselves on this subject. Then in the *Sanders case,* 166 U. S. 620, the Supreme Court said that even an *invalid mining claim made on agricultural ground* segregated the land from the public domain and it could not pass under the grant and it *naturally follows that a valid mining claim on mineral ground* would cut the land out of the grant, as said in *Barden and Sanders cases,* and while the location remained *uncancelled* the land could not pass to patent in the absence of notice, hearing and contest—examination and actual determination in which event the patent would be conclusive for all time against collateral attack, if issued in proper form.

Take the case of *Newhall v. Sanger,* 92 U. S. 761, which counsel said was "a direct attack." Land within the boundaries of an alleged Mexican grant which at the

time of the grant was *subjudici,* but which was afterwards held not to be a valid claim against the United States, and it was held it did not pass by patent to the railroad company and the claim was not pending in the local land office at the date of the map of definite route and a subsequent pre-emption patent *was held absolutely void,* and in this connection there is no difference between the patent and this patent as they were both issued in contravention of law.

The same rule was maintained in *Doolan v. Carr,* 125 U. S. 618, and while they were not mineral cases they are on a parity as they concerned lands which, like mineral lands, *were forbidden to pass under the railroad land grants,* and either being issued in "known" contravention of law would be void. In *Gregory v. Pershbaker,* 73 Cal. 117, we find the converse of our proposition. Of course, a patent for mineral land can only issue under the act of congress relating to the disposition of mineral lands *"on proof they are such."* The same rule excluded a *millsite* from mineral land is upheld in *Cleary v. Skiffich,* 28 Colo. 368, which is the converse of our case.

Of course, we admit, as pointed out in *Paterson v. Ogden,* 141 Cal. 43, that when an agricultural applicant (or any other applicant) has made application for a patent *and of which public notice was* given that all

parties would be bound to take notice thereof and that after such application, public notice, hearing and actual determination in accordance with the proofs that the patent issued in proper form would be conclusive. That is probably what Mr. Lindley intended to say! Such was the rule of *Saunders v. La Purisima*, 125 Cal. 159, but that case modified the rule by saying the mineral exception, in any event, destroyed the conclusive character of the patent. That is also the rule in *Richards v. Wolfling*, 98 Cal. 195, as to conclusiveness after contest, proofs, etc., and judgment, but not otherwise. So *it* is in *Hermocilla v. Hubbell*, 89 Cal. 5, which was based on the case of *Mining Co. v. Consolidated Co.*, 102 U. S. 168, in which it is held the question, "were the disputed premises at the time of the grant known to be mineral—that is, known to be valuable for minerals?" In the federal case cited, a grant *in praesent* of public land for school purposes *and* an agricultural state patent for the same were held *void* in a collateral attack by reason of the fact that the lands or part of the land was *known* to be mineral at the time of the patent; and in the same case the federal court pointed out the analogy of the rule of exclusion between *the act and railroad grants.*

It is ominous that counsel cited no authority to uphold the *Lindley* proposition that the law relating to known mineral lands at time of patent did not apply to agri-

cultural instances. Mr. Lindley, in the footnote to the text, citing as his sole authority, says:

> *"Scott v. Lockey Investment Co.*, 60 F. 34. *As opposed* to the doctrine of the text see *Kan. City M. & M. Co. v. Clay, (supra)*, 29 P. 9. Also, *Garrard v. Silver Peaks Mines*, 82 F. 587, C. C. of App. 94 F. 983."

The cases cited by Mr. Lindley under section 161 of his volume that "an agricultural patent" is conclusive, will ALL be found to be those cases digested in this brief, instances of where it was admitted that the *patents* issued within the jurisdiction of the land department, after examination and actual adjudication, which were *merely* voidable patents that could only be attacked by an antecedent title for fraud, imposition and mistake, and every case cited by Mr. Lindley and counsel were just such cases and not one of those passed on the question of *"known"* mineral lands rendering the patent void, and as a matter of law we contend that the patent *is void* for if the prior claimant stands by and after public notice allows the land to proceed to adverse adjudication he may only establish his antecedent title on the single *grounds of fraud, imposition or mistake* that illegally prevented the patent flowing to the antecedent title! This is the simple, elementary rule overlooked by Mr. Lindley and counsel on this subject, and this en-

tire controversy practically turns on this single, well-established proposition, viz: *"Both* the government and the grantee, as well as those in privity with him, *are bound by the recitals* of fact property contained in the patent, *(McGarrahan v. Idria Min. Co., 49 Cal. 331, S. C. 96 U. S. 316; Dean v. Long, 122 Ill. 447; Cyc. Vol. 32, p. 1038);* *but an opinion* of an executive officer *as to matters of law* indicated *(either) by the act of issuing the patent is not conclusive,* (Cyc. Vol. 32, p. 1038)," and the patent may be *examined by "searching the antecedent" record and there being no record in our case,* the patent at best is only *"an opinion of law evidenced by the issue of the patent!"* A patent may be shown to be void by searching the antecedent record. (Cyc. Vol. 32, p. 1043; *Andrus v. Wheeler,* 18 Misc. (N. Y.) 646, 42 N. Y. Suppl. 525; *Bledsoe v. Well,* 4 Bibb. (Ky.) 329), and when the court in this case finds there was no antecedent record, how may the patent be upheld? Furthermore, patents issued under railroad land grants are not subject to the rules and regulations relating to the issuance of patents for "agricultural lands." Pre-emption and homestead entries are governed by specific statutes that have no bearing on patents issued under railroad land grants and the land office regulations are not the same or alike.

An excellent work on mining law is *"Snyder on Mines."* In sec-

tion 205 he points out the error of Judge Sawyer in the *Cowell-Lammers and Francour-Newhouse cases*, and speaking of the conclusiveness of a patent properly adjudicated and containing recitals, the author says, (Sec. 209): "This observation, of course, has no application to a case where the patent *itself, pursuant to law,* expresses a reservation on its face. In such case, the reservation being barred out of the grant, the subject of it does not pass," and at Sec. 159 he cites our basic cases of *McLaughlin v. Powell, Alford v. Barnum, Merrill v. Dixon, Iron S. M. Co. v. Mike, etc.*

There is no difficulty in our case arising over the distinction between void and voidable patents as contended by the defendants. In *Horsky v. Moran,* 178 U. S. pp. 211-12, the court said:

> "On the face of the patent there is nothing to suggest *any exception.*
>
> "While it may be conceded, under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of the *mining claim* at the time of its issue might be shown and be a valid defense to a recovery of so much of the ground as was included *within the mining claim,* and in that event it may perhaps be not inaptly said *that the patent was to that extent void,* * * * *(citing U. S. v. Stone, 2 Wall. 525). In such cases* courts of law will pronounce them *void.* The

patent is but evidence of the grant and the officer who issues it acts *ministerially* and not *judicially.*"

In the court below counsel produced all sorts of extraneous proof in discussing the demurrer and cited land office records and correspondence and asked the court to take judicial cognizance of all things necessary to uphold their views, and we assume, therefore, it will not be amiss for us to call the attention of the court to some "real existing facts," and not fallacies that do violence to the real situation. We do not ask this court to assume anything in any particular *that is not absolutely the concrete undisputed record fact,* and therefore we say we assume this court will take judicial cognizance that hundreds of thousands of the granted acres are wholly agricultural and are solely devoted to agricultural uses, and that even the deserts around Mecca, Indio, Imperial Valley, etc., with artesian water at 300 inches, produce from six to ten crops each year! And further, that under the grant of July 27, 1866, the Southern Pacific Railroad Company has received ten million of the richest acres in the state *and over one-tenth of all the timber lands in the United States,* (see congressional debate concerning joint resolution of June 28, 1870, and recent report of Commissioner Knox), while the patent in controversy carries only 440,000 acres

and the acreage in controversy is only 3200. We further presume the court will take judicial cognizance that the country coterminous with the railroad from Goshen junction to within a few miles on the east from Coalinga is purely and richly agricultural and horticultural, as is the country from Alcalde to San Jose, including the famous fruit and alfalfa lands of the Santa Clara valley, while the lands in the Imperial Valley secured by the defendant railroad company are worth many millions of dollars! and are purely agricultural.

So it is with the claimed legal fiction of repugnancy which practically and actually amounts to nothing, but as "actuality" is not the base of the railroad defense we cited the following cases:

Painter v. Pasadena Land & Water Co., 91 Cal. 74, 83;

Adams v. Warner, 23 Vt. 395-414;

Foster v. Runk, 109 Pa. St. 291, 58 Am. Rep. 720, 721.

In the last cited case the court had under consideration a deed in which all mineral and metals were excepted and reserved. It was claimed that the reservation being as broad as the grant, was void, but the court thought differently, and after saying that the proper construction to be placed on the deed was that which

is made by viewing its subject-matter as the mass of mankind would view it, and continuing, said:

> "Construing the deed before us by this, the only proper rule, and there is no doubt but notwithstanding the very general character of the reservation, there was *something left* upon which the grant could operate, that the latter did not include the ordinary glebe, timber or waters."

And in *Adams v. Warner, supra*, the court said:

> "All reservations and exceptions, conditions or limitations upon a grant *are of necessity*, to a certain extent, inconsistent with the grant, becomes void. If an exception be of the whole thing granted, so that by giving effect to the exception the grant would become wholly inoperative, then it becomes *certain* the exception could not have been intended in that sense; and as it is impossible to know what it did mean, to save annulling the grant altogether the exception is held void. And so in all the cases, where any such rule of construction has been adopted, it has been for this reason, *and as a matter of strict necessity*."

THE STATE AND FEDERAL STATUTES OF LIMITATION ARE NOT APPLICABLE TO THIS SUIT.

We come now to the much insisted contention of counsel in reference to the binding force of the state and federal statutes of limitation as bearing on the mineral exception, and it may be said, as argued by us in

the courts below, that the whole contention of the defendant railroad company was not that it claimed any title to the property *but that owing to the law* it was immune from attack by this complainant.

At first the state statute was strongly relied on, then apparently abandoned as the defendants being out of possession (and never in possession as alleged and admitted), and the suit being to quiet title, the state statute did not apply.

Brusie v. Gates, 80 Cal. 462;
People v. Center, 66 *Id.* 552;
Casey v. Leggett, 125 *Id.* 672.

It occurs to the writer of this brief that in reason and by analogy the same rule should apply in construing the pleaded federal statute of limitations of March 2, 1896. Both in the *Chandler-Dunbar case,* (209 U. S.) and the *Louisiana-Garfield case,* 211 U. S. 77, the federal statute, unlike the state statute and all state statutes, on the subject, was determined to be a statute establishing a title not by prescription *but by way of a new grant,* and under no state statute may a title by prescription be established *where the defendant has not been in open, notorious* and continuing possession, under a claim of title, of the controverted land during the running of the statute! Such was the fact in the two

federal citations. If under the state statute an action was brought by the state to annul a patent for state lands the statute could not be pleaded by one who was out of possession and had never been in possession, and we doubt if even the defendant could plead the federal statute for such reasons against the United States, even in a case where the government brought an action to annul a patent.

Passing directly to the federal statute we find that Judge Ross did not in any way pass on or refer to the question except by implication in sustaining the general demurrer, which also contained the plea of the state and federal statutes. *The Act of March* 3, 1891, reads as follows:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of such issuance."

The Act (pleaded) of *March* 2, 1896, reads as follows:

> "That suits by the United States to vacate and annul any patent to lands heretofore *erroneously issued under a railroad* or wagon grant shall only be brought within five years from the passage patents hereafter issued shall only be brought within six years after the date of the issu-

ance of such patents, and the limitations of section 8 of chapter 561 of the acts of the second session of the fifty-first congress (Act of March 3, 1891) and amendments thereto is extended accordingly *as to the patents herein referred to. But no patent to any land held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.*"

So far as the land in controversy is concerned the fears of counsel that titles might be disturbed are without foundation and the same might be said of all the "mineral lands" claimed by the defendants as all such lands have been leased, and counsel will not dispute the fact, to the defendant Kern Trading and Oil Co., a subsidiary corporation wholly owned by the defendant railroad company.

It will be seen, so far as *bona fide* purchasers are concerned, that either a new grant is made to them or their previously bad or void or erroneous title is made good and the sale to them by the railroad company, ratified and confirmed, and thereby any apprehension of the solicitous railroad company concerning its "innocent" grantees *(and lessees!)* may be allayed. If persons, other than the Kern Trading and Oil Co. have acquired other mineral lands from the defendant railroad company, they may not make the plea of being innocent purchasers if their conveyances from the defendant railroad

company reserved *"all claim of the United States to said tract as mineral lands."* The suggestion is hypercritical as all persons in possession of lands under color of title, etc., are protected by the California statute of limitations as against "jumpers" and the United States has never troubled and will never trouble a *bona fide* settler. It may be that such *"innocent"* purchasers as the Kern Trading and Oil Co., the Standard Oil Co., the Associated Oil Co., may have some unpleasantness with the United States but up to date those companies have not suffered much through their *innocence.* We fear the tears of counsel that may be shed in their behalf will be unnecessary. So it is with the millions expended on those "agricultural" lands by the defendant railroad company! though nothing was said by counsel in the courts below concerning the many more millions extracted from those "agricultural" lands through the production of minerals!

Concerning the application of the statute (or statutes) to the suit we find that in any event *the statute ran only against the United States* and may not be pleaded against a private litigant, even if that litigant be standing in the place of the United States.

Holloman v. Bullock, 82 Miss. 405;
Peabody v. Gold Hill, etc., 106 F. 241;
Van Ness v. Rooney, supra.

In *Van Ness v. Rooney*
the California Supreme Court said:

(2) "The argument of the defendant that plaintiff is debarred from the relief he seeks because of the provisions of the act of congress of March 2, 1890, *is* wholly without merit. Plaintiff *is not* seeking in this action to *annul* or avoid a patent issued by the government of the United States. *The effect of granting the relief he seeks* does *not* in any way invalidate the patent in question. It is an interpretation of the instrument that will be brought about by the judgment in this action which will determine what, if any, lands in Sec. 29 of township 35 north of range 7 west M. D. M. *are included in the reserving clause of the patent*. It is safe to presume that when the president of the United States was about to sign the patent if it had been called to his attention that there was on said section 29 a quartz claim which had been duly located which was being worked which had definite bounds, or could be interpreted and defined, that he would have refused to sign the patent until those lands had been expressly excepted. But to *except* such lands *it was not necessary* for him to know an actual location had been made. *There* could be an actual, as in this instance it was, *without* the knowledge reaching the land department or the president *prior* to the issuance of patent. By virtue of such location, and because of the mining statutes and by reason of the interpretation made by the Supreme Court of the United States as to the effect of such location, the land embraced in the location had passed into the possession and control of the locator, his location had as effectually given him a right

to the possession of the located claim, as if it had been granted to him by the government of the United States."

Again, we find the limitation, in any event, is of kind; that is, the statute of 1891 was extended to the class of patents referred to in the Act of 1896 and simply prolonged the statute of 1891 to *past* patents for six years from March 2, 1896. In connection with the statute of 1896 we cite the *Winona case*, 165 U. S. 476, in which the act was construed and applied in the matter of the *validation* of *bona fide* purchasers and the validation paragraph in the Act of 1896 is conclusive *that no other* validation was contemplated!

There must be some basis for the action of the land department. Suppose that the land department had more than six years ago, quietly and without authority of law, patented to the defendant railroad company the postoffice building and grounds in San Francisco and the railroad company had quietly lain away the patent until yesterday, will it be contended that the statute validated the patent? Not at all! Why? Because under the *Dunbar-Chandler case the "mineral" land was not in kind*, as the Supreme Court said, *open to sale to an agricultural claimant* through the land department, and by analogy, mineral lands, say to the extent of 440,000 acres, *was not in kind* open to sale to an agri-

tural claimant under a grant of agricultural
d that expressly precluded mineral lands and
s the patent, in any event, affords no protec-
n except, possibly, to those "in kind" *entitled*
purchase the particular kind of land *not ex-*
ssly excepted from the operation of the grant.

The statute of 1891 ap-
ed to *all* classes of patents, void and voidable,
ile the specially superceding and applicable (if
y) land grant limitation act of 1896 applies
y to a *"voidable"* or *erroneously issued patent,*
t is, to patents *erroneously* issued within the
isdiction of the land department, through
ud, imposition or mistake, by means of fraud,
se testimony, forged documents, offered on ap-
cations for land under land grants (which, not-
thstanding counsel, the law and the canons of
rality do not require the court to assume to be
e, when they are admitted to be false), and
ere the only validation in the act is the verifi-
ion of the voidable titles of *bona fide* pur-
asers.

The Act of 1896, on
ese points, has never been passed on while the
t of 1891, under the *Chandler-Dunbar* case,
lidated all void and voidable patents on the
aning of the statute, and might have applied to
e patent at bar if we were seeking to *"annul"*
as we are *not*, only that before the statute of
91 in any event, ran, the statute of 1896 was

enacted and in view of that case the Act of 1891 must be in force today and control all federal action, in proper cases, against patents *except those issued under a railroad or wagon road grant,* but it cannot, we say, be contended, successfully, the statute of 1896 does not supercede the statute of 1891 insofar as the patent under consideration is concerned, and only the statute of 1896 is pleaded by the defendants.

Consequently, and in any event, it necessarily follows that even the United States is not limited by the statute of 1896 insofar as a void patent is concerned but only as to *"erroneously issued patents"* which, in any event, would require a direct attack by the United States and would not be subject to collateral attack in any event by an individual except in cases of fraud, imposition or mistake, and when he was in privity with the antecedent title.

Again, it is clear, as stated by Mr. Justice Holmes in both *the Chandler-Dunbar* and *Louisiana-Garfield cases,* that *no* title by prescription is established *but that a new grant is made by prescription and that the base of the grant is the validated void patent and not the original grant under which the patent purported to have issued,* for as the court said in the latter case: *"In U. S. v. Chandler, etc., it* was decided that this act (1891) applied to patents *even if void,* because of a previous reservation of

the land," and in the former case the court fairly and squarely said that the *validatea patent was a new independent grant.* Two things are clearly established by the two cases, namely:

1. That the reservation spoken of in the *Louisiana-Garfield case* was one for ordinary governmental uses and did not contemplate anything except such a specific federal reservation, like a reservation of specific land for the use of Indians, etc. This was so, as we shall later see, for in that instance the *United States was solely interested* in the land as specifically pointed out in the *Chandler-Dunbar case,* with no outstanding equitable or possessory titles, and if the patent was cancelled the land would revert to the public domain. There was no authority for the issuance of the patent at bar, and the *validation of the patent, by either statute, validated the exception therein contained.* Suppose this court finds that (1) that the patent was not issued in conformity with law, *for any reason,* it would necessarily follow that the patent would not convey title from the United States and consequently unless there was a subsequently validation of the patent, the only title, possessory title, the defendant railroad company would have, would flow through the grant and in that event it must be conceded our mining locations made in 1909 were valid. If, however, there was a subsequent validation of the patent the title of the defendant

railroad company would rest on the patent and if the "terms of conveyance" were thus validated *the mineral exception would be necessarily validated as it is a part of the description.*

Finally, on this point and at this part of our brief, though we shall later revert to a single specific proposition concerning it, we pass to the question that, assuming if the patent was for any reason void and was validated by either of the limitation acts, *did not such validation extend to every part of the patent and validate the exception of mineral lands?*

It has been repeatedly held that the base of the railroad title is the grant and not the patent which, at best, is only evidence of the title. If, for any reason, the patent was VOID, then concededly the railroad defendant could not prevail against a prior or subsequent valid mining location. If, by reason of the fact that the land was known to be mineral at the time of the patent or if the land was not a part of the public domain at the time the patent issued, then the patent is concededly void and if it be held that in such an instance the railroad defendant would be without title were it not for the validating statute of 1896, then it must follow and must be held that the *patent is the base* of the title as *Justice Holmes said the such validated patent is a new grant* and the railroad company would take solely by the patent *and not under the grant*, the

latter being *functus offico* and this situation arises, namely, neither on the date of the issuance of the patent or since could the railroad company, independent of the patent, retain the lands under the grant as they are mineral lands, and if they may retain the lands at all it must be by virtue of the patent issued and validated on the single theory that the United States, *being the sole owner, and the lands in kind being open to sale through the land department,* had the right to dispose of them accordingly, *independent of the grant,* and consequently, as the patent was validated independent of any granting statute, the title in the Southern Pacific exists solely through the patent and under the terms of the patent *which includes an exception of mineral lands* and it is competent now, for the mining locators to show by oral and other testimony the mineral character of the lands and *thus avoid the patent.*

The railroad company contends, by pleading the statute against certain of our contentions, that the base of its title is the patent validated by the Act of March 2, 1896, and such contention must, in the face of this bill and the demurrer, be true if the patent exists at all! *It is not and cannot be contended under such a plea that a patent issued without authority of law and validated by authority of law violates the law by the inclusion of the validated mineral exception. It does not violate the granting act because,*

in any event, the granting act is not the base of title, and it does not violate any law because it exists, if at all, because each and every letter and word in it has been validated by a statute which creates a new grant!

Counsel simply *assert* that the *Chandler-Dunbar* case did not hold that the statute of 1896 validates a void patent while the case says directly to the contrary as plain as words may make a sentence. Counsel say the case *merely* applies the familiar rule that a statute of limitation in regard to real property confirms the right as well as barring the remedy; that is a very superfine distinction but it does not do away with the positive ruling of the Supreme Court that the validated void patent *constitutes a new grant.* Very scant consideration is given to the subject by counsel who simply persist in being mistaken as to what the case holds and then back to their familiar proposition that our construction would not aid us because we are not in privity with the validated patent but surely we are in privity, in any event, *if the new grant validated the exception clause* for that withholds the legal title to the United States.

The position of counsel is similar in this regard to that of the United States in its motion for a re-argument in the *Chandler-Dunbar* case, which motion was denied. Government counsel argued strenuously that what

was "void" *could not* be validated; that twice nothing is nothing still, but the Supreme Court held to its positive ruling that the statute validated the void patent which amounted to a new grant of the controverted lands.

Then counsel here argued that in any event the validation would not extend to the patent because such validation would take back by the patent what was given by the grant! *Were unknown mineral lands given by the grant, or contemplated by the grant?* If not *(Barden case)*, their suggestion is fallacious to say the least and then in the last attempt to cast an anchor to the windward counsel cite from the *Chandler-Dunbar case this language:*

> "Counsel for complainant (the U. S.) raised two objections to the application of this statute. One that this suit is not a suit to annul the Chandler patent but only to maintain the title to these islands. * * * This amounts to a contention that, although the patent could not be attacked directly after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right of which flows from the patent itself. The proposition is too untenable for argument."

Why such citation was made is not apparent as we made no such contention and will not. But here is something we do contend: "But," continued the court,

> "we add that the general rule *is that possession of land under a claim of title* for a period prescribed by the statute of limitation vests the title for him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result."

While the above would indicate that possession is not necessary to plead the statute against the United States *it does not follow that possession is not necessary to maintain any statute of limitation between individuals contesting under the paramount title,* and we strongly urge this point on the consideration of the court. And then counsel said: "And there is no ground for the construction attempted to be given the *Chandler - Dunbar, Louisiana - Garfield cases.* There is nothing in Justice Holmes' language or holding in either of those cases that would lead to the one that he considered the statute after the time had run, a new grant in the form of the patent." Would it not have been better for counsel to have stated just what the court said on the subject? The language is plain as will be seen by reading (p. 450):

> "The patent had been issued in 1883 by the president in *due form and in the regular way.*
>
> "Whether or not he had authority to make it, the United States had the power to make it *or to validate it when*

> *made* since the interest of the United States *was the only one concerned. We can see no reason for doubting that the statute,* which is the voice of the United States, *had that effect.* * * * This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place."

And in construing this case the Supreme Court said in *Louisiana v. Garfield,* 211 U. S., p. 70:

> "In U. S. v. Chandler-Dunbar Co. it was decided that this act applied to patents *even if void* * * * *and it was said* that the statute *not merely took away the remedy but validated the patent."*

What, then, becomes of the contrary contention of counsel? We await their answer!

And continuing the court said:

> "In form the statute only bars suits to annul the patent (just as counsel contended), but statutes of limitation with regard to land, at least, which cannot escape from the jurisdiction, generally *are held to affect the right,* even if in terms only directed against the remedy (citing cases)."

And counsel added: "Showing by validation he meant absence of power to attack," which, in view of the language

just quoted by us, seem to us to be an extraordinary conclusion! And counsel continued: "As pointed out (*supra*) while this power existed (evidently the power of validation?) in the government, the government could not, however, take from the railroad company what the patent granted (note: the void patent could grant nothing!) and therefore could not validate the exception. And see also," said counsel, "*U. S. v. Smith Advance Sheets*, Fed. Rep. Vol. 181, No. 3, at p. 545, this language: 'The object of this statute is to extinguish any right the government may have had in the land and *vest a perfect title* in the adverse holder after six years from date of the patent *regardless* of any mistake or error in the land department or the fraud or imposition of the patentee.'" And the record in that case shows that the court was discussing a *voidable* and not a void patent and consequently the case fully agrees in every particular what is stated here.

Counsel closed their discussion of the subject by referring to the *voidable* patent case of *Peabody v. Gold Hill Mining Co.*, 106 F. 241 and 111 F. 821. We have no contest with that case; we only say it has no application. A stranger applicant subsequent to the patent issued *after* full and *complete* proof and *adjudication attempted to impeach the voidable* patent for fraud, imposition and mistake! Such is not our suit. The allegations in our bill of complaint that

the defendant railroad company caused a false and fraudulent application to be made for patent are not to be construed as an attempt on our part *to review* any finding of fact made by the land department and at this point we concede, as we have always done in this suit, that any finding except one, made by the land department herein are conclusive, and the one exception is the finding recited in the patent that the said tracts of lands lie coterminous to the constructed line of railroad and we set forth the application of Mr. Madden for the purpose of showing that the lands in controversy were not within the primary limits of the grant of July 27, 1866, under the theory expressed by Judge Bellinger in *U. S. v. Coos Bay Wagon Road Co.*, 89 Fed. 151. Whether lands are *within the limits* or subject to a grant *is not a question of fact* within the rule that the judgment of the land department is final in questions of fact. We were not and are not charging fraud, imposition or mistake concerning any question of fact decided by the land department that resulted in a decision within the above rule.

Such was the contention of counsel on the subject; they had nothing else to suggest and it simply goes back to their old proposition that it will be the duty of this court to "assume" that this court did not decide as the court said it did! Will counsel now say that, assuming the patent was void, that the statute of

1896 did not validate the patent as a part of the whole or if the patent was void and conveyed nothing did not the Act of 1896 give life to the exception as well as to the remainder of the granting clause, it being the part of an otherwise void granting clause, and if in accepting a void patent containing a void exception the railroad company is not estopped as against the government from denying the estoppel?

We will await the reply of counsel with some curiosity!

IV.

The fourth question certified to this court reads: "IF THE RESERVATION OF MINERAL LANDS AS EXPRESSED IN THE PATENT IS VOID, THEN IS THE PATENT ON A COLLATERAL ATTACK A CONCLUSIVE AND OFFICIAL DECLARATION THAT THE LAND IS AGRICULTURAL AND THAT ALL THE REQUIREMENTS PRELIMINARY TO THE ISSUE OF THE PATENT HAVE BEEN COMPLIED WITH?"

In such connection with such question we admit:

1. That if the patent in the language of the *Davis-Weibbold* and *Deffebach-Hawke* cases had been made up *"with recitals showing compliance with conditions* which the law prescribes," that such a patent, the min-

eral exception being nugatory, *would be conclusive.*

2. We admit that if the patent contained a statement of the quality of the land as required by the *Barden* case and proper recitals the patent *would be conclusive,* provided it issued on a jurisdictional record; but we contend being in privity with the federal title by reason of our relocation under a forfeiture of a prior location, we can maintain our direct action to avoid the patent and quiet our title under any circumstances.

3. We admit that if the patent was *perfect* in form and contained the recitals and statements required by the *Davis-Weibbold case* and the *Barden case* and the *Deffebach-Hawke case,* the patent would be conclusive, except as against our allegation that the patent is void, having issued in the presence of the prior mining locations.

4. Mr. Justice Field in the *Davis-Weibbold* case, 139 U. S. at 526 *(and in the same language in Deffebach-Hawke,* 115 *U. S. at* 406*)* considering what the effect of a patent was, said:

> " * * * *If the mining patent states* any initiating steps *in acquiring* title which antedates the title of the townsite, *that may suffice in an action at law,* but in this the patent *does not* show any initiating steps; *it merely refers* to the entry of the min-

ing claim and that was after the patent issued to the townsite.

"*No proof* was offered to show when the *mining claim was originally* located; * * * the absence of any proceedings *required by law* to initiate a right to a mining claim, *which* he might perhaps have shown would have been very pursuasive that no mine was known to exist."

We contend that this case is conclusive of our proposition that it requires a perfect patent to set the presumption of regularity in motion.

It seems to us that those two cases are decisive of the controversy here under the question under consideration as the patent before this court *lacks every element* which those two cases say was necessary to make a patent conclusive.

The argument of counsel in the courts below was to the effect that the *issuance* of this particular patent was a conclusive determination of the performance of all necessary antecedent steps, independent of any other fact; and that the lands contained in the patent description must be presumed to be agricultural as we have seen it is not conclusive that the lands are within the primary limits or subject to the grant as the patent contains no recitals on the subject and there is no antecedent finding on these subjects or concerning the quality of the land.

They did not argue that the presumption flowed from the *patent* but from the mere *"issuance"* of the patent; that the patent in itself amounted to nothing but that the "issuance" of the patent was everything, including statement, recitals, antecedent examination and determination!

The Circuit Court of Appeal evidently took no stock in any such hair-splitting theory as they certified no such question to this court. They do not ask if the *"issuance"* of the patent constitutes a conclusive and official declaration but they squarely ask *"then is the patent* upon a collateral attack a conclusive and official declaration," etc.

In this connection it must be remembered that we are not under any circumstances making a collateral attack on the patent. We are not seeking to destroy *any finding of fact* and a collateral attack *must always* and in every instance *be based on some finding of fact* made in another or different action or proceeding. While we uphold the patent as it is written our attack on the patent is based on the proposition that having issued in the presence of the prior mining location is *void* and such attack is *direct* and not collateral.

We attack no finding of fact made by the land department antecedent to the issuance of the patent; neither do we at-

tack any recital in the patent except that the lands are coterminous with a completed section of twenty-five miles if it can be inferred that the patent contains such a statement.

In a more or less rythmic flow of language some courts have, as it is evident from a study of the decisions, used the term "issuance of a patent" inadvertently in speaking of a patent and there stated that the issuance of a patent creates the presumption of regularity but in every instance, *and counsel* cannot show *to the contrary,* it was in case of a patent properly made up "issued in proper form" *containing necessary recitals* and in these cases the patent "controlled the situation," not the issuance of the patent but the patent. For example, suppose the S. P. R. R. Co. in this suit simply contented itself with showing that a *"patent issued"* without introducing or producing a patent, would it have any defense?

Surely not and yet such is their contention! Suppose the British again destroyed the national capitol and the records of the department of the interior were again destroyed as the San Francisco earthquake destroyed the records of the Southern Pacific Railroad Company, could the defendant railroad company win this lawsuit by simply showing "a patent issued" without making any proof of the contents of the patent, Surely not. And if in such instance the

Southern Pacific Railroad Company made secondary proof of the patent, which would be controlling, the patent, or proof of a clerical entry *that wholly without any supporting record* "a patent issued?"

Counsel evidently realized their dilemma and in the courts below contended that the patent, *wholly independent of its contents, its lack of recitals,* the piece of blank paper was the *"decision"* and *was the statement of quality.* They admitted a statement in the patent *was necessary* but contended the patent *itself* was the statement—only the force of arms, the arbitrament of the sword, could successfully establish such a proposition! Hard pressed, counsel said: *"Adequate examination is presumed by the patent. The patent is the determination;* and the *issuance of a patent under any particular 'grant' is the 'expression'* that the land is of the character contemplated by the grant and constitutes the *final declaration* of the government that all requisite preliminary steps have been taken," citing 32 L. D. 342, and the L. D. case cited is the one in which an assistant attorney general, construing the *Barden* case, says, notwithstanding his citation of that case, that he did not believe it necessary, however, to insert any such statement in the patent! That is the scanty "authority" of the defendants for the most remarkable proposi-

tion that ever fell from the lips of a *"juris consult"* and that is saying a great deal.

The contention of counsel simply amounts to this: "That wholly without a record, the land department, wholly without its jurisdiction, may issue a patent free from any statement or recital and that this court must *presume everything* that may be necessary to uphold the patent on account of its *'issuance.'"*

It will be noted in this connection that it was held in the *Kemp, Steele and Barden* cases that any presumption arising from the issuance of a patent or from a patent was limited in its operation to actions in *a court of law,* and not applicable to *equity.*

In the *Steel case* this court said: "The presumption thus attending it (the patent) are not open to rebuttal in *an action at law."*

In the *Kemp case* this court said, speaking of a patent: "The presumptions attending it are not open to rebuttal *in an action at law."*

At this point and at a time when we are about to take up and discuss the citations of counsel on this subject we wish to impress on this court the fact that the only *collateral* attack that is being made on this patent is being *made by the defendant.*

We uphold it as it is written in every word and letter and figure.

Counsel said "upon a collateral attack the patent is not only a conclusive declaration as to the character of the land but is also a conclusive declaration that all requirements preliminary to its issue have been complied with, citing:

Minter v. Commelin, 18 Hon. 87;
Smelting Co. v. Kemp, 104 U. S. 646;
Moffat v. United States, 112 U. S. 24;
Steel v. Smelting Co., 106 U. S. 450;
Carson City v. North Star, 83 Fed. 665;
Doe v. Mining Co., 54 Fed. 935;
Eureka Case, Fed. Case 45, 47;
Barden v. N. P. R. R. Co., 154 U. S. 288;
U. S. v. Ry Co., 67 Fed. 948;
Moore v. Robbins, 96 U. S. 530;
French v. Fyan, 93 U. S. 169;
Noble v. Union River Logging Co., 147 U S. 165;
King v. McAndrews, 111 Fed. 860;
Buena Vista Co. v. Tulare Co., 67 Fed. 226;
U. S. v. Mackintosh, 85 Fed. 333;
N. P. R. R. Co. v. Soderberg, 86 Fed. 49;
Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20;
Wright v. Roseberry, 121 U. S. 488;
Heath v. Wallace, 138 U. S. 573;

McCormick v. Hayes, 159 U. S. 332;
Lindley on Mines, 2d Ed., Secs. 161-162, 779.

A brief digest of each of the above citations will show their respective inapplicability.

1. As a primary point it is urged that in every instance the observations of the courts in the above citations were made in instances of *"voidable patents issued within the jurisdiction of the land department, based on an adequate record, resulting in an actual adjudication that in the record the applicant was entitled to a patent, thus leaving open only the antecedent title to its action to charge the patentee with a trust by reason of fraud, imposition or mistake in the actual proceedings!* And in each case *the antecedent record was before* the court for consideration.

Take for instance their citation of *Eureka case*, which is wholly in our favor. Mr. Justice Fields said in that case:

> "If the date of such location be stated in (patent) or *appear from the record* in the local land office, the patent will take *effect* from that *date*. It is *only* where an *adverse* party was required to *adverse* and fails *that the presumption of regularity arises*, and when no opportunity is presented to adverse *the rule necessarily fails.*"

2. *French v. Fyan* simply holds that in a case arising under the *swamp land* act the *decision* of the secretary of the interior in *designating* land as *swamp land* is not open to review in a collateral attack in an action of ejectment, that the land *was not* swamp land and in that case (93 U. S., p. 169) this court, sustaining the *decision* of the secretary of the interior, said:

> "But a careful examination will show that it *(decision in R. R. v. Smith, 9 Wall, 95)* was done with hesitation and some dissent in the court. The admission (of testimony) in that case was placed expressly on the ground *that the secretary had failed or neglected or refused to do his duty.* (* * *) (And that is the exact condition in this suit) * * * the matter to be shown is one of observation and *examination,* whether arising before the secretary whose duty it was to *primarily* decide it, *or before the court whose duty* it became because the secretary failed to do it."

The case is not only wholly in point and in our favor but it answers fully the question of Judge Ross in the *Roberts* case when he asks "where did the officers of the government * * * get authority to cast upon courts or juries the duty of determining the character of the public lands?"

A further answer to this question will be found in *Wright v. Roseberry,* 121 U. S. 488, in which a pre-emption

patent issued on the application of a duly qualified pre-emptor was held *not* conclusive and a claimant seeking under a state swamp land patent was permitted to show, notwithstanding the pre-emption patent, that the *secretary of the interior* had failed *to pass* on and *decide* the quality of the land which the state patentee claimed was swamp land. It was strenuously claimed in that case that the federal pre-emption patent was conclusive of every fact necessary to uphold its issuance but this court held the pre-emption patent was not conclusive *and the duty was cast on the court of determining the quality of the land!* and similar rulings will be found in *Cyc. Vol. 32, p.* 1043; *Andrews v. Wheeler*, 18 *Misc.* (N. Y.) 646; *Bledsoe v. Wells*, 4 *Bibb* (*Ky.*) and in *Doe v. Mahana*, 21 *Howard* (*U. S.*) 276, a similar ruling was made by this court, and alike decisions were also made by this court in *Hedrick v. Hughes*, 15 *Wall.* 123, and *Johanson v. Washington*, 190 *U. S.* 179.

An interesting case arose in *E. O. L. Co. v. Brosnan*, 147 *Fed.* 807. There had been a grant of land to the state of Oregon under a wagon road act and after due compliance with the law there was a finality and the state, under the grant, issued its patent and the title through mesne conveyances reached the plaintiff who claimed possession, etc.

It appeared that *long after* the issue of the grant and *long* after the

issue of the patent the defendant made an agricultural entry on the land, claiming that prior to the taking effect of the grant the lands had been occupied by a *bona fide* settler *other than himself* and that by reason of such fact the title remained in the United States and did not pass by the grant and patent, and that he thus obtained the right to take up the land *in the presence of the patent.*

The claim was allowed by the interior department and defendant took possession of the lands.

In an action of ejectment the court held that if the *prior* occupant of the land had made a declaratory statement the lands *did not pass* under the grant and patent and defendant had the title; that if the *prior* settler had made no declaratory statement *the title did pass* to the state and its patent could not be attacked! *And* so far as our claim of the force of the prior mining claims is concerned and of the invalidity of the patent in such connection, it is our case in a nutshell. It covers every question of privity with the paramount title and conclusively shows that the segregation of the land under the prior settlement kept the legal title in the United States and that when the equitable title was lost or abandoned the right of re-settlement could be made in the presence of the grant and patent!

If the prior mining lo-

cations were made according to law the *title did not pass;* if the prior locators were mere squatters then it did in so far as those locations were concerned, but as the demurrer admits that the prior locations were made, it will be difficult to discover how the title could pass in presence of such locations.

McCormick v. Hayes, 159 U. S. 332, cited by counsel, is distinctly in our favor. In the case, this court, concerning when the courts *have* permitted in subsequent suits oral evidence to determine the character of lands claimed to be swamp and overflow, said, *page* 342:

> "There is in this case (citation) no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the *secretary had made any decision,* the evidence would have been excluded."

The case clearly holds that a *decision,* an actual decision, is necessary in order to make a patent conclusive and declarative—an attempt had been made to defeat the *action* of the secretary of the interior in a certain instance by means of a collateral attack but the attack was defeated for the simple reason *that the antecedent record* showed that the secretary had made an antecedent *decision* and so it is with their citation of *Noble v. Union River Logging*

Co., 147 *U. S.* 165.

Time and time again in the courts below counsel cited the L. D. case of *Courtright v. Wisconsin Central Rail. Co.* (19 L. D. 412), but made no reference in their arguments to the vital point decided by Secretary Hoke Smith and decided erroneously, too, in that case—discussing a railroad land grant, he said, (p. 412): *"The grant passes title and patent is unnecessary for that purpose."*

Will counsel so contend here?

If counsel rely solely on the grant of July 27, 1866, and so contend, their day in court will be one of mourning, for by so contending they would lose, absolutely, the mineral lands! All through this case counsel for the defendants contended that the grant was nothing and the patent everything, *nevertheless one of their principal citations distinctly avers to the contrary!* A court, a secretary of the interior or even counsel may not blow hot and cold at the same time and we submit that when they cite the land decision in *Courtright v. Wisconsin R. R. Co.* they must take all of it, and if *Secretary Smith* was right in saying, *"The grant passes title and patent is unnecessary for that purpose,"* it follows that the defendant railroad company is without defense herein, as the grant excludes "all mineral lands."

That the primal decision of Secretary Smith and his opinion is artificial and involved and was erroneous is clear in view of the well settled legal proposition that when a grant provides for the issuance of a patent *the title remains in the United States.*

Recurring to the case of *Noble v. Union River Logging Co., supra,* we find (1) with respect acts involving the exercise of judgment or discretion, the courts have no power to control the executive dissection but with respect to ministerial duties an act or refusal is subject to review by the court ("syllabus.")

That the secretary of the interior, in issuing a patent, acts in a ministerial way and not judicially was pointed out by this court in *many other instances* and when the secretary is *deciding* antecedent to the issue of the patent he is acting judicially and when he issues the patent as the result of the *antecedent* decision *or without it* he is simply acting ministerially and thus an erroneous issuance of a patent might be attacked as a ministerial act.

The remaining paragraph of the *syllabus* in *Noble v. Union River Logging Co.* reads:

> "2. Under the Act of March 3, 1875, granting to railroads a right of way through public lands, the question whether a railroad is entitled to the benefit of the grant is one for the secretary of the

> interior to decide, *and when decided and his approval noted upon the plats,* the act vests the right of way in the railroad company; and a revocation of the approval of the secretary of the interior by his successor in office is an attempt to deprive the company of its property without due process of law and is void."

It is difficult to see here the citation favors the Southern Pacific Railroad Co.

The *French-Fyan case,* 93 *U. S.* 169, cited below by counsel, is fully digested in the foregoing case and this court said:

> *"In French v. Fyan,* 93 *U. S.* 169, it was held that the *action* of the secretary of the interior identifying swamp lands, making lists thereof and issuing patents therefor could not be impeached *in an action at law* by *showing* that the lands which the patent conveyed were not in fact swamp and overflowed, although his jurisdiction extended only to lands of that class."

It will be observed that the court states, and the *French-Fyan case* absolutely shows that there had been an *actual identification and designation* of the lands by the *secretary of the interior.*

Further in the Noble-Union River Logging case, this court, at p. 175, after citing a number of cases which were cited by counsel as above under the certified question under consideration, said:

> "The lands over which the right of way was granted were public lands subject to the operation of the statute * * * which it was competent for the secretary of the interior *to decide and when decided and his approval noted on the plats* * * * *."*

So the case, like all the other cases cited by the defendant, is *absolutely* without force under the point cited as each of them, when discussing a patent, *presumed* and showed an antecedent record and *actual antecedent finding and decision* of which the patent is the result.

In looking over the transcripts of every case we have had access to, and that means nearly 100 % of the cases cited by counsel, we find that in each and every instance *there* was a record containing the antecedent record in the land office that *showed* an *actual formal antecedent* finding and decision and in these cases when a collateral impeachment of the patent was not permitted, the court decision was, in every instance, *based on an actual antecedent* decision by the land office that resulted in a patent.

The contention of the defendants that the patent is conclusive and declaratory of the agricultural quality of *all lands* embraced within the patent description is illogical, incongruous and *not* sustained by a single authority. To say that it is conclusive is to say that it

means the exact opposite of what it purports to say. It *shows* on its face that it was issued under the Act of July 27, 1866, and the joint resolution of June 28, 1870, which especially provided that the grant made should not embrace mineral lands of the United States. The patent itself shows that *only two things were adjudicated* by the *land department* and that is (1) that the line of the Southern Pacific railroad had been completed from San Jose to Tres Pinos (in California) and that the distance between these points was 252-479/1000 miles, and (2) "the *said tracts of land lie coterminous to the constructed line* of said road," and the granting act required not only construction but a completed section of twenty-five miles before patent issued! and there is no record or antecedent decision that the forty miles referred to in the Madden application had been completed.

This court will notice that it *was not even adjudicated* in the land department that *any* of the lands described in the patent "lie within the primary limits of said road" and *that the patent is absolutely silent* as to the location of the lands! Where will the defendants go to find their lands? To the record *of course*, for if the patent is conclusive, and it *must* be resolved against the patentee, the Southern Pacific Railroad Company may not claim a single acre of land, mineral or non-mineral, under the

patent of July 10, 1894, because it does not appear from the patent that the lands were granted or within the primary limits of the grant.

The plain inference from the patent is that no investigation whatever had been made, and the patent simply recites *"and whereas* the following tracts have been duly listed under the act aforesaid by the duly authorized agent of the said Southern Pacific Railroad Company as shown by his original list of selections, *approved by the local officers* and on file in this office."

This court will perceive it to be absolutely necessary to turn to the *"approval"* record of the local land office to ascertain what has approved there. We find this language in the certificate of the local register and receiver who, after reciting the accuracy of said limits, continued, "and further certify that the filing *of said list* is allowed and approved; that the whole of said lands are surveyed public lands and within the limits of twenty miles on each side; that the same is not (nor is any part thereof) *returned* and denominated as mineral land, etc. * * * "

This court will note there was no approval of any land, even by the local officers; that the "local approval" only extended to the filing of the list, coupled with a statement that the land had not been returned (by the surveyor general) as mineral land and was

within certain limits. *That* is the only record, finding, decision or determination by any office or officer of the government that antidated the issuance of the patent and the defendants are claiming lands under such a record worth a *half a billion of dollars* and is exceedingly worth that on such a record and under all the circumstances any one should dare to question its illegal and dishonest claims and pretensions.

So after all is said and done the question really resolves into a construction of the patent and in that connection this thought occurs to us, *It is conceded, it is established, and that beyond any question, that if A should convey to B, by grant deed, six hundred and forty acres of land, excepting the mineral therein, or any subdivision thereof, in which mineral should thereafter be found, that such an exception would be valid and that the grantor of his administrator, executor or assign could at any time thereafter, even a thousand years thereafter, enforce the exception. (Maxwell etc. v. Dawson,* 151 U. S. 586, 604; *Cox v. McClure,* 71 Conn. 729; *Stockton v. Morris,* 39 W. Va. 432; *Greenleaf v. Birth,* 6 Peters 302; *Painter v. Pasadena etc.,* 91 Cal. 74.)

Now if it follows that a patent of the United States to land within California is subject to the same rule of construction that applies to an excepted deed between individ-

uals, it will also follow that the contention of the appellees is without force in such connection.

When Mr. Justice Fields was chief justice of the Supreme Court of California he passed squarely on the question and, backed unanimously by the concurrence of his then associates on the bench, said:

> "The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property *is subject to the same general rules of construction* which apply to the conveyances of individuals. From the operation of conveyances of this nature, that is, of individuals, the minerals of gold and silver are not reserved *except by express terms.* They pass with the transfer of the soil in which they are contained—and the same is true of the operation of the patent—the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains *in them without a similar reservation.*"
>
> *Fremont v. Fowler,* 17 Cal. 225.

And the case has been acted and approved many times. *(See Sheppard's California Citations)* both in state and federal courts.

The defendants are forced necessarily to this conclusion, namely, that it being the antecedent duty of the land department to primarily decide the quality of the land

that the *issuance* of the patent creates the *conclusive presumption* that such duty was performed and that we are precluded from searching the antecedent record or from proving that there was no antecedent record. We allege they did not comply with the act of congress, the patent shows conclusively they failed to comply with the law but still the court is asked to presume that what they did not do they did do because the law said they must so do.

2. To predicate such a contention counsel ambiguously contended that they complied with the regulations of the land department, so far as they were concerned and even if such claim was true, as their demurrer admits was not, they would be in no better position as this court in *Turner v. Sawyer,* 150 U. S. at page 587 said:

> "* * *; nor do the regulations of the commissioner of the general land office, whereby a party may be held to prove his better claim to enter, *oust* the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

3. The converse of such proposition is that if the patent was issued in violation of law and of the rules of the department that the patent is not conclusive.

It must be conceded by counsel that if the land department (1) has the

right and power to make rules for the regulation of its business and procedure; (2) that such rules have the force and effect of law; (3) that the department is bound by its rules during their continuance; and (4) that the violation of a rule of the department amounts to a violation of law. The courts (this court) have held that a person may be convicted of crime and punished for a violation of a rule of the land department, and if a penal liability will follow a violation surely a civil liability will follow in the wake of a violation not only of a duty *imposed* by law on the land department, but of a duty prescribed and regulated by its own rules and procedure. The court will remember that the patent issued on July 10, 1894, and that the rules going into effect July 9, 1894, referred to by Secretary Hitchcock in 32 L. D. 341, did not apply to the patent in controversy except in the particular of proof, and if they did, so much the worse for the defendants, for not one of those rules was complied with by the department previous (or at any time) to the issuance of the patent, and neither did the department comply with the law of "primarily determining" the quality of the land nor with any of its rules and regulations. Judge Ross apparently did not pass on this point, and the appellees, struck by the force of the argument, contended that appellant could not avail himself of the point because he did not specifically allege in his bill that the rules of the

land department then in existence had been violated.

The bill charges and the demurrer admits such fact, and in all the cases that may be cited by the defendants it is affirmatively stated over and over again that under the law it is the duty of the land department to "primarily determine" before issuance of patent the quality of the land, and the demurring defendants admitting there was no such primary determination it follows that the excepted patent issued in violation of law and is void. (112 U. S. 24; 89 F. 811; 189 U. S. 54; 109 U. S. 205; 156 U. S. 494; 200 U. S. 71.) It will be remembered the appellees filed only a general demurrer, and the bill specifically alleges that the patent issued without *primary determination of the quality of the land, and that there had been no hearing or decision in the land office,* which is a statement of the fact and is better pleading than to allege that the patent issued in violation of law or in violation of the rules and procedure of the land department, which in any event is merely a legal conclusion.

That a patent issued in the manner indicated is void is fully approved in *Moffat v. United States,* 112 U. S. 24; *Kirwan v. Murphy,* 189 U. S. 35; *Whiteside v. U. S.,* 93 U. S. 247; *Hume v. U. S.,* 132 U. S. 406; *Niles v. Cedar etc.,* 175 U. S. 300, and we call the attention of the court to the citations in connection with our

own contention that a patent is only conclusive of the matters actually passed on and decided prior to its issue.

Mr. Justice Van Derventer, when at circuit, speaking of the rules and regulations of the land department in *Leonard v. Lennox*, 181 Fed. at p. 768, said:

> "*Of the contention* that the local land officers waived compliance with the regulation by not insisting thereon it is enough to observe: First * * * and, second *that had they been charged* with the duty of passing on such applications, they *could not* have waived compliance with the regulation *because* it had the *force of law* and was no less binding on them than on the applicants"—

In that case the *proof* in the land office covered all the requirements except as to the non-saline character of the land and B contended that for such reason the patent *was not conclusive* and A in reply contended that such proof was unnecessary as the *surveyor's* return showed the land was not saline, just as it is contended here that the surveyor's return shows the land covered by the patent was non-mineral but if we may not go to the antecedent record, as contended by the defendants, such contention is futile—In such connection and in the same case at p. 768, Mr. Justice Van De Venter said:

> "* * * it is next urged that in this instance compliance with the reg-

ulations (of the land department) was not necessary because the land, when surveyed, was noted upon the surveyor's return as being agricultural in quality and not saline.

Passing the fact that the surveyor's return, which was made fourteen years before the application (and our survey was nearly 30 years before the patent issued) would afford no information in respect *to determining* discoveries, we think the contention is foreclosed by the decision in *Barden v. N. P. R. R. Co.*, 154 U. S. 288, where it is said:

"Some weight is sought to be given to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral—But the conclusive answer to such alleged determination and report is, that the matters to which they relate *were not* left to the surveyor general—Neither he nor any of his subordinates were authorized *to determine finally* the character of any lands granted or make any *binding* report thereon —Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties: *but* they are not clothed with authority to *especially* examine them: nor does their report have any binding force—It is simply an addition made to the general information obtained from different sources on this subject."

II.

The discussion under this point has proceeded, on our part, under the theory that *we were not making a collateral attack on the patent* but were upholding the same as it was written under the record on which it issued. Of course it is difficult for us to conceive how our suit may be classed as a collateral attack—A collateral attack requires the *specific* attack in some finding of fact in another suit or proceeding and there was no finding of fact it necessarily follows that this suit may not be classed as a collateral attack—

An attack on a judgment valid in its face under the charge that it had been issued wholly without a witness sworn, a fact proved, without pleadings or parties, counsel, etc., would not be a collateral attack. It would, like our suit in that instance, be a direct attack. If we set up some testimony given in the land office and then here attempted to prove its falsity then our attack would be collateral and we would be precluded. It maybe that the court below, that is a member of the court, concluded the attack was collateral because we alleged the falsity of the Madden application to which there was no special demurrer or motion to strike. The Madden application stated the lands "are vacant, unappropriated," etc., while as a matter of fact the

lands were occupied under a valid mining location. If there had been subsequently any actual decision that the lands were "vacant, unappropriated and non-interdicted mineral lands," then this suit might be classed as a collateral attack. The only statement made by the land department was "that the lands fall within the twenty miles lateral limits of said route, and that the said lands, *so far as the records of the general land office show,* are free from conflict," etc. Now if that be a primary determination that the lands were (1) non-mineral, (2) vacant, (3) unappropriated, this suit would not even then be a collateral attack, but a direct attack based on a mistake in law in issuing the patent on such a record. The contention in the courts below by counsel that we were making a collateral attack on the patent was based solely on the proposition that because we contended that the patent issued in the presence of the prior locations and without an antecedent determination that we were making a collateral attack while we contended that, in such instance we were making a direct attack. Counsel contended that we contested their theory that the court must presume there was no prior location, that there was no antecedent or primary determination, that we were making a collateral and cited nearly a hundred cases in which every instance the contestant was alleging perjury, etc., in the evidence that resulted in a definite ante-

cedent determination. We do not allege that the patent was issued on *false testimony;* we allege it issued without testimony or judgment, and that is the difference between a collateral attack and a direct attack. If our relocation placed us in privity with the paramount title, then we can maintain any suit in regard to the title that could be maintained by the United States, either on our behalf or in a wholly independent action. So while disclaiming that we are making any collateral attack, we will, out of our deference for the court below, try to show that, under the circumstances, this attack must be sustained even if classed as a collateral attack on the presumption of regularity attending patent.

At the outset we assert it to be an elementary proposition that needs no citation, that no process, judgment, decree or patent is attended by the presumption of regularity in its issuance unless the papers on its face is regular and bears the impress and carries the language of regularity.

An ancient will, deed, or other document regularly executed may be received under the presumption of regularity and due execution if it carries such impress, but if on its face it shows lack of conformity with the statute, as our patent shows lack of prior determination, then it would be worthless.

Once the presumption of regularity is broken down in this suit the defendant corporation is stripped of defense and stands naked at the bar of justice.

The crime of the century will be wholly revealed, the plundered treasury of the government will be replenished and even at that the defendant corporation will not be crippled or harmed, for nearly a million of acres of now idle and vacant land resting under the shadow of so-called S. P. patents will be restored to the public domain, then developed, turning hundreds of millions of dollars into circulation in the territory of the defendant corporation, and if the Southern Pacific Railroad Company would cease playing the dog in the manger and permit the development of California it would enhance the assets of corporation many fold.

The defendant corporation has greatly enhanced its values since the few years it was relieved of the political control of California and permitted by the people to wholly devote its time to the carrying of freight and passengers and when it quits trying to control the mineral development of California through its dummy corporations it will have still more time to devote to passengers and freight and nothing stands before such consummation, devoutly to be wished, but the invoked "presumption of regularity flowing from the issuance of a piece of paper

with some words and figures with plenty of blank spaces for the insertion of the imagination, space for this court to write in that the land is more valuable for agriculture than for mining, that it is not the richest mineral land in the world, that thousands of wells are not spouting their riches from those "agricultural" lands, that there were no prior locations, no prior mining claims, that the Madden application was true, that there was an actual decision in the land office that the lands were vacant, unappropriated, non-interdicted mineral lands and that the solemn agreement between the United States and the defendant railroad company that the mineral exception should be inserted was a "wrong" to the poor innocent Southern Pacific Railroad Co., led into a pitiable condition by that erstwhile missionary, Collis P. Huntington, that is what must be done under the presumption of regularity and just such presumptions or claims of such presumption in favor of predatory wealth and "Big Business" is the cause of the political upheaval in which the platform of one political party is, "You are a thief," and the other is "You are a liar," and the consequences of which will be relegation of political corporations to the strict performance of the functions for which they were organized.

The writer of this brief strictly understands that only questions of law should be argued here, but necessarily law must

be based on morality and honesty and courts must necessarily take cognizance of what is known to the man on the street. Every man in California knows in his heart that the Southern Pacific Railroad Co. has "taken" the oil lands under the "presumption of regularity" and is invoking the statute of limitation in contemplated civil actions, and what is worse, until recently, but few men in California thought the defendant corporation could be fought successfully and successfully brought to justice. Standing at the bar of justice the defendant confessedly, without equity, without justice in its claim, without even a single meritorious defense, asks this court to presume everything in its favor, even in the face of its demurrer and the record. The defendant corporation failed even in its practice. Such questions as are raised herein by the defendant railroad company under a general demurrer and now recognizing its dilemma insists that the demurrer is not an admission on its part of the existence of the prior mining locations or an admission on its part of the lack of the primary decision *or an admission on its part that it assented and agreed that the mineral exception should be inserted in the patent and should be binding.* It argues that the demurrer admits only what is well pleaded and claims generally nothing is well pleaded except possibly its general demurrer. If it were dissatisfied with the bill of complaint a special de-

murrer or a motion to strike might have changed it somewhat, but at best the demurrer interposed raises no question at all except possibly the general want of equity and of jurisdiction, but to claim now that the general demurrer does not admit the existence of the prior locations, the forfeiture of the same, the relocations and the issuance of the patent in the presence of the prior locations needs no citation of authority for refutation and justifies an attack on the patent on the theory it is void.

As the question certified to this court asks if a collateral attack may be made on a patent so written and so issued we will endeavor to show this court that such attack, under the circumstances, is permissible and we will discuss the subject *independent* of all other questions and propositions involved in this controversy.

This court must remember, however, that the question certified to this court *necessarily refers* to the patent before it *and not* generally to patents made up in due form, with proper recitals and statements and in discussing the question we leave out everything except the patent in controversy, avoiding all reference to want of antecedent record or the mineral exception and strictly confining ourselves to the patent *as it is written* and therefore the *concrete* question arising, "is the patent in contro-

versy, *as it is written*, (1) a conclusive and official declaration that the land is agricultural and (2) that all the requirements preliminary to the issuance of the patent have been complied with?"

In regard to (1) it must be remembered, as will be plainly seen from the debates in congress on the general question of railroad land grants, that the mineral exception was inserted in the respective grants for two purposes, (a) that mineral lands should not and could not pass to the railroad grantees, and (2) that those self same lands, mineral lands, should be reserved for the argonaut, the miner and prospector as at no time since the establishment of the government has the United States ever used any of the public lands for public uses but has reserved them in every instance for the use of its citizens except a few acres here and there for some military use or naval base, etc. (137 U. S. 170.)

Our basic text that such a patent as ours is not conclusive on a collateral attack is taken from the *Barden case* and reads as follows:

> "The fact remains that under the law the duty of determining the character of the lands granted by congress, and *stating it in instruments transferring the title of the government* to the grantees, reposes in officers of the land department. *Until such patent is issued, defining the character of the land granted and showing that*

it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; *but a patent issued in proper form,* upon a *judgment* rendered after due *examination* of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

It is impossible for us to state the legal proposition in clearer language; it is the law as announced by this court—the final interpretation of authority, and it may only be avoided by finding by this court now that it *is not the law!* and that this court was amiss in the *Barden* case.

The statement is clearly made that until such patent is issued, *defining the character of the land* and *showing* it is non-mineral *it will not comply with the act of congress.* How could the patent *define* and *show* the character of the land except by statement and recital? Under this ruling the officers of the land department failed to *comply* with the act of congress and such lack of compliance renders the

patent void and subject to attack. No presumption of regularity attends the patent at this point and if the *Barden* case has any force or value this court must now hold the patent void or reverse the *Barden* case as the language of this court in that case admits of no compromise. Either the *Barden* case is not controlling or the patent is void.

Counsel in the courts below contended that the defendant railroad company had no voice in the form of the patent issued but Mr. Justice Fields in *LeRoy v. Jamison*, 3 *Saw'y* 369, said:

> "No one can be compelled by the government to become a purchaser or *even* to take a gift. *In order* that the patent of the government may take *effect as a conveyance so as to bind the party to whom it is executed* and transfer title to him, it is essential *that it should be accepted*. The *acceptance* by the grantee of the conveyance where no obligation is imposed will always be presumed in the absence of express dissent whenever the conveyance is placed in a condition of acceptance."

This court will note the language of Mr. Justice Field, "So as to bind the party to whom it is executed." Later we will refer to the subject.

The bill of complaint herein alleges the express acceptance of the patent by the Southern Pacific Railroad Company, to-

gether with all its terms and conditions and its demurrer necessarily admits the fact, and the subject is fully discussed later in this brief.

In attempting to meet the rule laid down in the *Barden case* that until "such patent issued, *defining* the character of the land granted," etc., they insisted that the word "it" meant the "land department" and not the "patent"—the case reads "until *such* patent is issued *defining* the character of the land granted and *showing* that it is non-mineral *it* will not comply with the act of congress in which the grant before us was made to plaintiff," the extraordinary argument is advanced by the Southern Pacific Railroad, realizing the deadly and controlling force of the *Barden rule,* that *"it"* refers to the *"land department"* and not to the *"patent."* Even the defendant railroad realizes that only by reversing or misconstruing the *Barden case,* even to the point of absurdity, may its cause be saved and hence the whimsical argument as above was made in the Circuit Court of Appeals.

It is only by such illogical, absurd and ludicrous construction may it be made to appear that the defendants have a shadow of claim to the lands in controversy which they are not claiming through the *"land department"* but through the *"patent"*—such construction in italized words was claimed by the defendant at p. 106 of their brief and argued and in-

sisted on in the Circuit Court of Appeals, and before Judge Ross.

Well, suppose, for the sake of the argument, that *"it"* does refer to the *"land department"* and not to the *"patent"*—how does *"it"* help the defendants if the land department *"did not comply with the act of congress"* in issuing the patent, as in such event the patent would be absolutely void.

Surely if the land department issued the patent in violation of law the patent must be *void and not* voidable, and a collateral attack is justified! No complaint is made at this point by the defendants that the rule of the *Barden case* is another expression of *obiter dictum* as they cited the rule time and time again throughout their brief and in their arguments in the courts below and we are content they should impale themselves on either horn of the dilemma!

In the *Eureka case* Mr. Justice Fields said, (in a collateral attack):

> "It is only where an adverse party was required to adverse and fails, that the presumption of regularity arises and when no opportunity is presented to adverse the rule necessarily fails."

And in *Wright v. Roseberry*, 121 *U. S.* 519, this court said, (in a collateral attack):

> "The doctrine that all presumptions are to be indulged in support

> of proceedings upon which a patent issued and which is not open to collateral attack *in an action of ejectment*, where it is shown that the land in controversy had, before the initiation of the proceeding upon which the patent issued, passed from the United States."

And in the same case the court said that swamp land cases were analogous to railroad land grant cases, and we insist that the presumption of regularity never runs in a direct action in equity where there is an express attack on such presumptions; it only flows in actions at law where an attack is made on some finding of fact made in another action.

That is the case here; owing to the prior uncancelled mining locations, validly existing at and before the time of the initiation of the railroad application for patent, the lands had passed away from the United States in so far as their disposal was concerned, and we shall hereafter show under *"question six"* that title so outstanding or those lands *have never passed back to the United States!*

It must be conceded, we think, that the *patent on its face* shows it was not issued in a manner substantially *regular* and therefore it *cannot* be presumed that formal requisites for its validity were complied with. (*Ste. Dig. act* 10; *Fay Ev. Sec.* 124; 1 *Gr. Ev. Sec.* 20; 2 *Whar. Ev. Secs.* 1302-1309; *Applegaith v.*

Lexington, 117 *U. S.* 255, 264; *Adams v. Coroles*, 95 *Mo.* 501; *Hogue v. Corbit*, 156 *Ill.* 540; *Berrengberg v. Boston*, 137 *Mass.* 231; *and note*, 1 *Elliott Ev.* 99), and in connection therewith the following citation from *Reynolds Trial Evidence*, *Sec.* 81, is cited by us, as applicable to the situation:

> "But where a court exercises a special or limited jurisdiction under a special statute prescribing the occasion and mode of its exercise, no such presumption (of regularity) arises, but, on the contrary, the proceedings must be fully set forth in the *record* and they will be held *illegal* unless it appears therefrom affirmatively that all the facts requisite to confer upon the court the jurisdiction it exercises were duly *alleged and proved*. (*Thatcher v. Powell*, 6 *Wheat.* 119, 127; *Hall v. Howd*, 10 *Conn.* 514; *Tracy v. Roberts*, 88 *Me.* 310, 316; *Warren v. Bank*, 157 *N. Y.* 259-276; *Willamette Co. v. Hendrix*, 28 *Org.* 485.) It must be remembered that all jurisdictional facts necessary to entitle a plaintiff to the benefit of a special or statutory proceeding must be proved by competent legal evidence in a court before he can obtain a judgment in such proceeding. *Ex parte* affidavits required as a preliminary to the issue of process are not legal proof that the facts alleged in such affidavits are true and the proof of the truth of such facts are as much a judicial *requirement* as is the filing of the affidavits, so that plaintiff cannot succeed, if he fails to provide such proof at the trial—while in suits strictly *inter partes* jurisdictional facts may generally be proved by mere admission made in the

> pleadings or otherwise, or even by failure of the defendant to deny such facts when alleged by the plaintiff, but *this* is not the case in proceedings *in rem* where the purpose is condemn property seized *or determine the status of a person or thing* for it would be most unjust that the rights of persons not duly summoned to appear before the courts should be injuriously affected by the mere statements of others not made under oath or subjected to the test of cross-examination."

Does such rule apply to the land department and to *ex parte* applications for patent? In this suit the patent issued, it is claimed by the complainants, on an *ex parte* application, based on the *ex parte* affidavit of *Jerome Madden*, the land agent of the defendant railroad, which is the *record* base of the application and all subsequent procedings culminating in the patent.

This court in *Burfenning v. Chicago, etc. R. Co.*, 163 *U. S.* 321-323, said:

> "Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not*, presents a question *of fact not resting on record, dependent on oral testimony*,"

and the question arises as to what this court meant when it used the language cited. This court in that case distinctly said that the determination by the land department of the mineral quality of land sought to be patented presented a question of fact *not resting on record* and it could only

mean the *record* contained in the land office, contained in its books, maps, records, surveys, and reports which the court said is not sufficient but the determination of such fact is dependent *on oral testimony.*

There can be no dispute concerning what is meant by "oral" testimony—an *ex parte* affidavit may never be classed as "oral testimony."

The action in the cited Burfenning case was one where the plaintiff claimed under a patent from the United States, dated June 13, 1884—the defendant claimed the patent was void because the patent covered lands "included within the limits of an incorporated * * * city," and this court said:

> "The case of *Morton v. Nebraska,* 88 *U. S.* 660, is very closely in point. In that case the plaintiff held a patent void for lands in Nebraska which were *saline* lands and *noted* as such in the plat books, although the notes thereof had not been transferred to the register's general plat."

And then this court went on to say that a patent obtained under such circumstances was not conclusive and said:

> "In that case it will be observed that the *records* (of the land department!) disclosed that the lands were *saline* lands when the proceedings in the land department *were had.* So the case *was not one in which the department determined a*

fact on parol evidence, but one in which it acted in disregard of an established and recorded fact. * * * This is not a case in which the patent was *founded* upon actual occupancy for homestead purposes, or in which *nothing* appearing but the patent itself there might be some uncertainty as to the time at which the patentee's rights were initiated, *whether* before or after the incorporation of the city. It is one where, affirmatively, *and by the record,* it is disclosed * * * and in that respect differs from *Texas, etc., v. Smith,* 159 *U. S.* 66, in which, *on account of the absence of all testimony* there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect."

Now, we submit, that when this court said that the determination of the question whether the land was mineral or not is dependent on *oral testimony,* it means at any rate that only a question of *law* was decided by the land department when it concluded to issue the patent, not issued in due form, with recitals and statement of the quality of the land is not conclusive, on the record existing in the general land office.

Colburn v. N. P. R. R. Co., 164 *U. S.* 383.

In the *Colburn* case the defendant railroad company, in that action, was sued for damages for failure to *convey* a legal title to certain premises which the railroad company had contracted to convey to plaintiff. The

plaintiff further alleged that the railroad company did not have a legal title as *in certain other proceedings,* (to which plaintiff was not a party) the secretary of the interior *decided* that the land did not pass under the land grant to the railroad company, but was subject to entry and patent under the general land laws of the United States.

In that contest in the land office the railroad company was a party and the railroad company in its answer alleged, amongst other things, that in the contest in the land department the secretary of the interior had decided that a prior locator by reason of cultivation and occupation had created a claim which he could have perfected under the public land laws and therefore the land was excepted from the railroad grant. There was a decision in favor of the plaintiff in the state courts and on writ or error here this court said:

> "On the merits of the case it may be observed that the burden of the decision of the Supreme Court of the state is that because the land department *had decided adversely* of the claim of the railroad company and *because no direct proceedings had been had to set aside the decision, it was conclusive against the company.*
>
> "In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the general line of general route, and also of definite location, the situation of the land and its freedom, from

> *record claims*, were such as to *prima facie* vest a title in the railroad company. It is true it is also disclosed by the answer that one Kelly was in occupation or at least collaterally the land at the time of the filing of the map of definite location and the decision of the land department as to that fact undoubtedly concludes both parties, * * * and while the decision of that fact might be conclusive between the parties, his ruling of such occupation and cultivation created a claim exempting the land from the operation of the land grant, *is a decision on a matter of law* which does not conclude the parties, and which is open to review in the courts."

And then this court, pointing out that the act of congress operated to pass the *fee* of the land *independently* of the issue of the patent, said that even if a patent had issued, which had not, *it would not have been conclusive even in an action at law*, and concluded by saying:

> "For the reasons above indicated, because the decision of the land department was only on matters of fact *and did not conclude* the law of the case, and *because* such facts so found *were not of themselves sufficient* to disturb the title of the railroad company, the judgment is reversed, etc."

The case of *Johnson v. Drew*, 171 *U. S.* 93, cited and much relied on by counsel in the courts below, is absolutely in our favor in every detail. The case simply held that a patent could not be avoided by one in prior possession *who had not complied with the law, who*

never took any steps to secure a title, and then this court continued: "But whether a party was or was not in possession * * * is a question of fact, *dependent on parol testimony,*" and then follows the above citation found in the cited case of *Burfenning v. Chicago, etc.*, 163, *U. S.* 321.

In a statement of the case of *Johnson v. Drew, supra,* made up by Mr. Justice Brewer, it appears "the patent to plaintiff was issued * * * *and recited* that it was upon a location of Valentine Script," and the entire holding of the case simply was that a *squatter* on public lands who had made no entry nor *"took any steps to secure a title"* could not maintain any action to eject a subsequent patentee *who had complied with the law.* This court will note that the patent contained full jurisdictional recitals as will be seen by a reference to the patent which is recorded in the general land office.

What a Patent Must Contain to Render it Conclusive.

The contention of the defendants in the courts below was based entirely on the observation of the circuit judge in *King v. McAndrews,* 111 *Fed.* 870, that the *"patent is the judgment"* of the land department, while we contended that when this court said in the *Steele case,* 106 *U. S., "that the patent is the result of the judgment"* that the contention of the defendants

was entirely refuted in such regard and when it *affirmatively* appears there had been *no judgment* at all in the land department that the patent, issued without a judgment, was not conclusive! A deed in an action to quiet title, made up and issued by the clerk of a court would, in the absence of an antecedent judgment rendered by the court, not be conclusive in a collateral attack when the rule of *res adjudicata* was invoked and the same rule applies, we submit, to a *patent* illegally issued without an antecedent judgment, and, in any event the patent would not be conclusive *unless so made up and so recited as to render its recitals conclusive,* as otherwise the rule of *res adjudicata* as stated by Mr. Justice Van De Venter, *supra,* would not apply.

None of the cases cited by the defendants in this regard hold that the *patent is conclusive* but they hold as pointed out in *Johnson v. Drew,* 171 *U. S.* 93, and all the other cases on the subject that the *decision* (judgment) rendered on *oral* testimony as to whether land is mineral or not is a question of fact, and that such decision, rendered on *oral testimony,* is not open to relitigation and is conclusive except in cases of fraud, etc."

A patent that is issued as the result of an antecedent judgment as pointed out in the *Steel* case is conclusive in an action of ejectment and if the *jurisdiction facts and state-*

ments as to the quality of the land be not set forth in the patent we would necessarily be forced to go to the antecedent decision or judgment to ascertain what title, if any, be carried by the patent! Even Mr. Lindley, cited by defendants, speaks of the patent as the result of an antecedent judgment as in Sec. 161, it is stated, speaking of the land department, says, "has jurisdiction *to determine* the character of the lands *and its decision culminating* in the issuance of a patent is *conclusive,*" and the meaning of the word "culminating" in this regard is well defined. It means "the result of antecedent action, of antecedent determination, of antecedent judgment," or it means nothing.

Counsel in the courts below tried to avoid the force of the rule, saying that we were contending that if a homestead applicant made his application, furnished his non-mineral affidavit and received his patent, that we contended that if no one appeared in that proceeding to contest his right and if subsequently mineral is found his patent could be collaterally attacked, or putting it in another way, as they said, "Every patent that is issued without a land office contest would be subject to collateral attack!" Of course we made no such absurd claim or argument. The law provides a way in which a homestead applicant must obtain his patent and if the law be followed and a patent issue that ends

the matter for all time as the applicant, like a mining locator, *claims* under a general statute and the land department is authorized to point out the procedure which must be followed and no mere irregularity in the procedure would permit a stranger to the title and a stranger to the proceeding to set up such irregularity in a collateral attack. A person in touch with the antecedent or paramount title could, however, impeach the patent in any form of action, in which it was offered against him provided, the homestead applicant had not given the *notice* of such application that the law requires. If a homestead applicant knowingly or unknowingly took up land known to be mineral at the time of his application his patent would avail him naught, if otherwise the land was known to be mineral. It is just as pointed out by this court in *Vance v. Burbank*, 101 *U. S.*, when this court said, as was pointed out in *U. S. v. Minor*, 114 *U. S.* 243, (the first a collateral, the second a general attack.)

That *was* not a suit by the grantor, (the United States), to set aside the patent, but by a party, or the heirs of a party who *had* contested the right of a patentee before *all* the officers of the land department up to the secretary of the interior, and had been defeated, and where the whole question depended on disputed facts, the evidence of which facts was submitted by the contestants to those officers. In such a

case, where there was full hearing, rehearing and issues made up and tried, the observation of the court *"that the decision* of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," *is well founded."*

In the second place there is no analogy between a homestead case and this suit for the reason that this suit is *based* on a mining relocation arising through a forfeiture of a prior location, under a general statute, the mining laws of the United States.

Such a location could not be made in an instance where a homestead applicant was in actual possession of his land, that is, not until his entry had been *cancelled* after notice and hearing, and the law points out a way in which, in a proper instance, a homestead entry may be cancelled in the *land office* at the instance of a contesting mining locator or relocator.

Where the patent issued to such a homestead applicant it would either be (1) regular, in which no one, not even the United States could attack it, or (2) voidable, in which only the United States or an antecedent title could attack it, or (3) void, in which instance it might be attacked *by any one in any form of action.*

If the patent in such instance issued without recitals of the jurisdic-

tional facts, an antecedent record supplying the jurisdiction facts would be sufficient to maintain the title of the homesteader, but we are of opinion that if wholly without an entry, wholly without any record, wholly without any proof, and wholly without any jurisdictional facts, the secretary of the interior should hand to John Doe a patent for one hundred and sixty acres of land, already covered by existing, valid, perfected mining locations, he would not be able to retain or to legally secure possession of and title to such land.

This court must always bear in mind that we are not strangers to the title or do we lack privity with the title as will be pointed out conclusively and elsewhere in this "brief."

So we say, if the law be followed in homestead cases and the regular *statutory* procedure followed, the patent containing proper jurisdictional recitals will be conclusive just as a proper patent in this instance would have been conclusive and that brings us to the concluding part of the argument under this point, namely:

"What Must a Patent Contain to Render it Conclusive on a Collateral Attack?"

1. It will be noted that homestead patents contain a recital "that pursuant to the act of congress, approved May 20th,

1862," to secure homesteads to actual settlers in the public domain, and the acts supplemental thereto, *the claim of John Doe has been established and duly consummated, in conformity with law*, etc., etc., and then the patent proceeds with the terms of description * * * and also "subject to the right of a proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted." There is no provision in the homestead act "authorizing" the insertion of such an exception, and while more than, probably, a *million* of homestead entries have been made, *no court* has declared the "ore" exception to be nugatory or void!

2. The patent in preemption cases recites the congressional act, that the ground had been purchased and *"which tract has been purchased by John Doe"* and the patent proceeds to terms of description and carries a similar reservation concerning the right of removing ore, etc.

3. *The swamp land patents carry full recitals,* and in *Wright v. Roseberry* this court pointed out that the swamp land act was analogous to railroad land grants in so far as the defining of the quality of the land was concerned.

4. The placer mining patents carry full recitals of entry and purchase

of described mineral lands, subject to five conditions and reservations.

The rules of the general land office in each of the above instances *require an antecedent decision and judgment concerning all the jurisdictional facts.*

Of course we are not standing on the right at this point to make a collateral or other attack on the patent under any theory that we are not or were not in privity with the paramount title at the time of the commencement of this suit and it will be necessary at all times, in so far as we are concerned in discussing the fourth and sixth questions certified to this court, to consider them jointly, for in answering the 6th question we conclusively establish our right, in any event, and independent of all other questions in the case to make, if necessary, a collateral attack on the patent and to establish that it is not an official and conclusive declaration that the lands are agricultural and of the kind contemplated by the grant by reason of our privity with the legal and paramount title of the United States.

THE SIXTH QUESTION READS: "DOES THE FACT THAT THE APPELLANT WAS NOT IN PRIVITY WITH THE GOVERNMENT IN ANY RESPECT, AT THE TIME WHEN THE PATENT WAS ISSUED TO THE RAILROAD COMPANY, PREVENT HIM FROM ATTACKING THE PATENT ON THE GROUND OF FRAUD, ERROR OR IRREGULARITY IN THE ISSUANCE THEREOF AS SO ALLEGED IN THE BILL?"

Court and counsel apparently agreed with us that we were in privity with the paramount title, in any event, subsequent to the issue of the patent, and at and since the time of our relocations, and the question apparently concedes so much and by implication asks if it was necessary that such privity exist *at the time of the issuance* of the patent.

This court will remember (1) the prior valid, subsisting recorded notices of mining locations remained in full force and effect from November, 1891, until March, 1909; (2) that forfeiture or abandonment may *never* be presumed *from mere lapse of time* but must be affirmatively proven, and in such connection we contend that the demurrer necessarily admits:

1. The making of the prior mining location, (2) their existence and continuance during the period between Novem-

ber, 1891, and March, 1909, with *continuous* and *uninterrupted* possession of the lands in controversy in the prior locators during that time and (3) the forfeiture of these prior locations and our relocations in March, 1909.

On such statement and the record it necessarily follows, we submit—

I. That even if the mineral exception be nugatory and void the paramount title of the lands in controversy by reason of the prior location was held by the United States in trust for the prior locators on the date of our relocation, and that the prior estate was in privity with the paramount title at the time of the issuance of the patent.

II. That if the mineral exception be valid the lands in controversy were a part of the public domain in March, 1909, and subject to location or relocation under the mining laws of the United States.

III. That even if the mineral exception be nugatory and void the paramount title of the lands in controversy by reason of the prior location was held by the United States in trust on the date of our relocation.

IV. That if the paramount title to the lands in controversy was held in trust by the United States on the date of the relocation, it remains in the United States, being held in trust for the relocators.

We submit that by reason of the relocations made by us in March, 1909, we have the equitable and possessory title and have the right to quiet our title in this suit under the paramount title against all who present adverse claims or titles.

We were not in privity with the paramount title until the moment of relocation, except possibly by way of relation.

Counsel did not argue that privity with the paramount title at the date of the issuance of the patent was essential, but they argued that the prior mining locations were extinguished or cancelled by reason of the issuance of the patent, and consequently we could not in presence of the patent obtain privity with the paramount title.

They said the court, in order to uphold the patent, would presume either that no locations had been made or, being made, had been abandoned. We therefore say:

LOCATING A MINING CLAIM PREDICATED ON THE DISCOVERY OF MINERAL AND RECORDING THE SAME AS REQUIRED BY RULES OF THE MINING DISTRICT WITHIN WHICH THE CLAIMS ARE EMBRACED CREATES AN ESTATE OF FREEHOLD WHICH CONTINUES UNTIL THE LAWFUL CANCELLATION OF THE LOCATION BY A TRIBUNAL OF COMPETENT JURISDICTION, OR UNTIL THE CLAIM IS ABANDONED OR FORFEITED AND IN SUCH LATTER TWO INSTANCES AND UNTIL SUCH TIMES THE LEGAL AND PARAMOUNT TITLE IS HELD IN TRUST BY THE UNITED STATES FOR THE PRIOR MINING LOCATOR.

In *Noyes v. Mantle*, 127 *U. S.* 349-351, speaking of the legal rights of a locator after location properly made under the mining laws of the United States, this court said:

> "The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect and that they could obtain at any time upon proof of what they had done in locating the claim and of subsequent expenditures to a specified amount in developing. *Until the patent issued, the government had the title in trust for the locators or their vendees.*"

In *Haws v. Victoria Min. Co.*, 160 *U. S.* 303, this court said:

> "The possession under a claim established according to law, is fully recognized by the acts of congress *and patent*

adds to the security of the party in the continuous possession of mines he had discovered or bought."

In *Mery v. Brodt*, 121 *Cal.* 332, the California Supreme Court said:

"What is the nature and character of their holding, they being valid locators of mining claims? The locator of a mining claim under the laws of the United States has the right to the exclusive possession and enjoyment of that claim. *He has an estate of inheritance; he has a title which can only pass by deed.*"

And similar rulings have been made by all courts passing on the title of a mining locator. (See, in particular, *Belk v. Meagher*, 104 *U. S.* 279-287; *Nevada, etc., Oil Co. v. Home Oil Co.*, 98 *Fed.* 673; *Thallmann v. Thomas*, 111 *Fed.* 277.)

This court in *St. Louis Min. Co. v. Montana Mining Co.*, 171 *U. S.* 650, 655, held that where there is a valid mining location, *the area becomes segregated from the public domain* and is the property of the locator and in *Meydenbauer v. Stevens*, 78 *Fed.* 787, the court said:

"The effect of a valid location of a mining claim * * * *is to segregate or cut out the ground located from the public land; and until the locator either abandons his claim or forfeits it* by the nonperformance of the annual assessment work,

the same ground cannot be located or possessed by another person."

And the same rule is reiterated in *Manuel v. Wulff*, 152 *U. S.* 510; *Forbes v. Gracey*, 94 *U. S.* 762; *Black v. Elkhorn Min. Co.*, 163 *U. S.* 445; *Gwillim v. Donnellan*, 115 *U. S.* 45; *Clipper etc. v. Eli etc.*, 194 *U. S.* 220-226, *and not even the United States may prevail against the title of a mining locator.*

THE TITLE SO CREATED REMAINED IN FULL FORCE AND EFFECT, EVEN AGAINST THE UNITED STATES, UNTIL CANCELLATION, FORFEITURE OR ABANDONMENT.

(a) Forfeiture does not ensue for failure to comply with the law relating to the performance of the annual labor; *as* between the locator and the United States *it matters not* whether the annual labor be performed; it requires the intervention of a third person and the *relocation* of the ground before forfeiture may arise. *The right of the original locator is terminated* only by the entry of a *new one* or by cancellation in a proper proceeding in the land office *founded on notice* to the original locator.

Little Gunnell Co. v. Kimber, Fed. cases, 8402;

Beals v. Cone, (a noted case), 27 Colo. 473;

Barkalege v. Russell, 29 *L. D.* 401;
Iron S. Min. Co. v. Campbell, 135 *U. S.* 286;
Marques v. Frisbie, 101 *U. S.* 476;
Quinby v. Conlan, 104 *U. S.* 420.

(b) NO PRESUMPTION OF ABANDONMENT ARISES FROM THE LAPSE OF TIME; THE ABANDONMENT MUST BE AFFIRMATIVELY PROVEN.

Therefore it affirmatively appears and must be taken as the undisputed fact here that at the time of the application of the defendant railroad company for a patent *that the land in controversy* was not a part of the public domain, over which the United States had jurisdiction to patent to the defendant railroad company. The rights and estates of the prior mining locators were definitely fixed and they had fully complied with the requirements of the law.

The only answer made by the demurring defendants to this proposition is that the claims of the locators were not pending in the local land office at the time of the filing of the map of definite location and we submit that such a contention is simply absurd—we have shown (1) the making of the locations, (2) the recording of the same in the office of the recorder of the Coalinga Mining District and which district embraced the lands in controversy—That

made complete compliance with the law—No filing or recordation of mining claims in the local land office is required or permitted by law.

The Locator, just as he pleased, might or might not apply for a patent: a patent added little, as this court has said, to his title—If he finally concluded, for any reason that appealed to him, to apply for a patent, his claim on such application would at some time appear in the local land office and *could not* appear before that time—

Counsel devoted much time and space in the courts below in claiming and arguing that the prior mining locations had no binding force because they were not pending in the local land office but we consider further comment unnecessary, and especially so as this court has said in the *Barden* and *Sanders* cases that such a view is untenable and that the right to make a mining location in case of railroad land grants after the filing of the map of definite location *is the one right reserved out of the grant.*

So it must be conceded that the patent to the Southern Pacific Railroad Company did not carry the title of the United States to the defendant railroad company as it had no title that it could part with except to the mining locators and the situation arose, the prior mining locators held and maintained their estates

until the same were forfeited to the plaintiff and his co-relocators on the 2nd day of March, 1909.

Counsel attempted to intimate that it did not appear that the prior mining locators had not continued in continuous possession of the mining claims and that the court in order to uphold the mining patent would presume that possession had not been continued and that the claims had been abandoned—Such a contention is, for the following reasons, futile:

1. "Where a statute speaks of parties in possession of a mining claim *it means a constructive possession which the law attaches to the title.*" *Heinze v. Butte etc.*, 126 F. 1, and cases cited which include decisions of this court on the subject.

2. A person may be in legal possession of a mining claim though not personally on the ground at the time of a stranger's entry. *Davis v. Dennis*, 85 P. 1079.

3. *Abandonment cannot be presumed from lapse of time.*

It appears in the bill of complaint that on the 2d day of March, 1909, the complainant and his co-locators went upon the land and ascertaining that the prior locators had not performed the necessary annual labor as required by law, exercised, as they had a right in

such instances, a forfeiture and *relocated the lands* under the mining laws of the United States.

The prior locations were made on a contemporaneous discovery of mineral and the relocators, independent of any discovery on their part, had the right to base the relocations on the antecedent discovery of mineral by the prior locators and as a matter of fact and of law to base their new estate of freehold and interitance is based on a discovery that was the *base* of the prior estate of freehold and inheritance.

"The relocator has the same rights as the original locator, although in strictness not a discoverer at all."

Armstrong v. Lower, 15 M. R. 631;
Zerres v. Vanina, 134 Fed. 615.

FORFEITURE OF A MINING CLAIM DOES NOT CAUSE THE LAND TO REVERT TO THE PUBLIC DOMAIN: IT PASSES INSTANTER TO THE RELOCATOR AND THUS MAINTAINS PRIVITY BETWEEN THE RELOCATORS AND THE PARAMOUNT TITLE, NAMELY, THE LEGAL TITLE HELD IN TRUST BY THE UNITED STATES, UP TO THE MOMENT OF FORFEITURE, FOR THE PRIOR LOCATOR!

Cyc. Vol. 27, pp. 599, text and foot note with cases associated under first note 62.

The paramount title was held in trust for the prior locators up to the moment of forfeiture and relocation when the re-

locators *succeeded* to the mining claims and to the rights of the original locators in so far as the rights of the relocators *arose under* the original discovery of mineral on which the prior and subsequent estates of freehold and inheritance *were solely built*—

The base of the title of the prior locator and the relocator is the original discovery by the prior locators and if there was a discovery of mineral, as the bill of complaint alleges and the demurrer admit, the relocators have a perfect estate of freehold and inheritance! *There was no interregnum or lapse of time between the forfeiture and the relocation!*—the forfeiture and the relocation being a simultaneous act, each within the other.

The instant the entry was made and the notices posted on the lands in controversy, the trusteeship of the United States shifted or passed to the interest and for the benefit of the relocators, with the forfeiture *running* to the relocators and *not* to the United States: and there was no *mesne full* and completed legal and equitable title in the United States, even for an infinitesimal fraction of a second or at any time after the first location and the relocation, *nor is there now!*—simply the paramount title in the United States with the possessory title in this complainant and co-relocators.

The relocation at bar is predicated on a forfeiture arising through the non-performance of the annual labor, and *not* on an *abandonment* of the mining claims by the prior locators—By abandonment the prior mining claim would revert to the public domain, instanter, and the United States would have the complete legal and equitable title in the lands which under a forfeiture the possessory title would pass, instanter to the relocator as was pointed out by this court in *Lavagnino v. Uhlig*, 198 U. S. 443, as in that case this court held a relocator was not entitled to advance an application for patent under a junior overlapping claim and the ground of the decision was *that on forfeiture* of the original location the land *did not become a part of the public domain but passed to the locator!* That case settles the question of priority on our part with the paramount title.

Of course we do not contend that there is any privity between the estate of the prior locators and the subsequent relocators as the prior estate was extinguished by the forfeiture and relocation—We could not maintain any rights that the prior locators had nor do we succeed to their choses in action but their prior discovery coupled with our own discovery is the base of our title and their possessory title passed to us and we have the right to adopt a part or all of the boundary stakes using the de-

scription of the prior locators set out in their location notices *(Miller v. Taylor*, 6 Colo. 41; *Brockbank v. Albion Min. Co.*, 29 Utah 367; *Conway v. Hart*, 129 Cal. 484) and this surely shows a succession, independent of all other arguments, of legal rights, the only thing being extinguished by forfeiture and relocation being the right of the defaulting locator to remain in possession of the land or to assert any claims in connection therewith.

If the United States held the legal title in trust for the prior mining locations it could in no way *divest* itself of the paramount title and with forfeiture of the possessory or beneficial title at the time of relocation, necessarily, the paramount title continued in the United States and privity with the paramount title was established by the forfeiture and relocation.

In *Zerres v. Vanina*, 134 Fed. 615, it was held in conformity with all the decisions that "the original locator of mining ground is the discoverer and relactor is not a discoverer at all but a mere appropriator thereof and cannot hold the ground without making proof of forfeiture."

The relocation necessarily admits the validity of the prior location—Indeed, as said in *Snyder on Mines*, the existence as a fact of the former location (and discovery)

is the basis on which it rests and while this succession does not establish privity with the prior estate it is in conformity with our proposition that there was an instant shifting of the beneficial estate at the moment of forfeiture and relocation which placed us instantly in privity with the paramount title—That being so it necessarily must be admitted that we may litigate in the courts of the United States concerning our possessory and beneficial title independent of the paramount title by reason of the federal statute which provides.

> "No possessory action between persons in any court of the United States for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the Law of Possession."
>
> *U. S. Comp. Stat.* (1901) Sec. 910.

The only argument made by counsel in the court below concerning this subject were predicated on their following contentions:

1. That the mining claims of the prior locators were not pending in the general land office on application for patent at the time of the filing of the map of definite location and therefore and notwithstanding the perfected mining location, the lands in controversy

passed by the grant! We have fully answered that contention heretofore.

2. That it is not alleged that any mineral in *paying quantities was discovered.*

Discovery of mineral in *paying quantities* is not required in order to make a valid mining location, *mineral* only sufficient to justify a reasonable man to make further investigation and expenditure of time, labor and money is necessary and we will rest this contention without further argument.

Iron S. M. Co. v. Mike & Starr Gold & Silver M. Co., 143 U. S. 394;
Burke v. McDonald, 2 Idaho 339 & 679;
Harrington v. Chambers, 3 Utah 94;
M. C. R. R. v. Migeon, 68 Fed. 811;
O'Donnell v. Glenn, 8 Mont. 248;
Book v. Justice Co., 58 Fed. 827.

3. That is not alleged in the bill of complaint that (a) the annual assessment work for any of the years succeeding such location was ever performed or (b) that such locators ever remained in possession of said claims or (c) that the prior locators performed any development work thereon or (d) extracted any mineral therefrom and (e) that the kind of mineral discovered is not described.

In answer we say (a) that the performance of annual assessment labor is only necessary to prevent forfeiture and as between the government and the locator the performance of the annual labor is unnecessary (leading case, *Beals v. Cone*, 27 Colo. 473) *and valid entry can only be cancelled by a new entry:* (b) possession is presumed from the mining title as we pointed out elsewhere in this brief (c), the performance of "development work" is only required in instances where there is a local rule or statute requiring the performance of "development work" and no such statute or local rule ever existed or now exists in California; (d) it is not necessary to "extract mineral" from a mining claim if the locator prefers to keep his mineral in the ground and not "extract" the same it is his business and his business only and (e) as we say "mineral" includes all or any kind of mineral and there being no "special" demurrer in the case the question of sufficiency of any alleged minor fact may not arise here.

Finally the defendants claimed (a) that such prior locators were not in privity with the title of the United States and could not have maintained any suit themselves to protect their possessory and beneficial title and on examination of such argument this court will find that it is entirely predicated on their contention that until a mining locator has secured a patent

from the United States he cannot maintain an action to quiet his title against trespassers, interlopers or predatory railroad claimants seeking title to mineral lands under the guise of an "agricultural patent"and such extraordinary argument was advanced and insisted on by counsel in face of the statute that permits claimants to the public lands under possessory title to litigate such questions *independent* of the paramount title of the United States and cases were confidently cited that were *decided prior* to the passage of the statute and two unreported decisions by district judge Wellborn that an action to *cancel and annul* a patent of the United States could not be maintained by a person claiming under a mining location until such time as the mining location had ripened into a patent!

In these cases Judge Wellborn cited and approved the proposition that the mineral exception was valid but said that the *action to cancel* the intermediate railroad patent could only be maintained by a subsequent patentee! We have continuously contended that we are not trying to cancel a patent but in the language of *Van Ness v. Rooney* in speaking of such a patent we are seeking an interpretation of the patent in an effort to ascertain if the legal title to the lands in controversy passed under the patent.

Scores of cases of litigants claiming under possessory and beneficial

titles are daily heard and decided by courts in the mining states and it will be a new and extraordinary doctrine to be announced to those courts that a mining locator may not quiet his title to his location until such time as he has secured a patent to his land and it will be a further extraordinary proposition to announce to those courts that a title to a mining claim is not safe from intrusion until a mining patent is secured—If it were true as contended by counsel *that the legal title was vested in the defendant* railroad company at the time of the relocation then we would admit that our relocations were futile and this action could not be maintained.

In such connection they also cited the case of *James v. Jameson,* 155 Cal. 275, which simply holds that a mining location may not be made on land held under a homestead location and that after the matter has been fought out in the land department in a contest of which the mining locator had due notice the subject will not be reopened in the courts as to the questions of fact passed on and decided by the land department and that consequently a patent issued under such circumstances may not be collaterally impeached and cancelled.

Furthermore counsel contended that a mineral locator had nothing but "the right of present and exclusive possession" for the purpose of mining but that the land lo-

cated and held under the valid, subsisting mining locations does not cease to be a part of the public domain *until patent issued* and that prior to that time the legal and equitable title remained in the United States, but even at that the *"possessory title"* was not in the United States and all outstanding titles remaining in the United States were held solely by the government in trust for the locator, and under the statute above referred to all litigations concerning the possessory title could be litigated in the courts of the United States independent of the paramount title, thereby *sweeping* aside the former rule that the question of title could only be litigated or questioned by the paramount title or that a suit to quiet title could not be maintained by the equitable title against the legal title.

"But" continued counsel "even if it be conceded that a mining location which has *not* been entered in the United States land office *vests* in the locator the *complete* equitable title, with the legal title remaining in the United States, such rule is not controlling because the assertion of the mining claim does not deprive the land department of its jurisdiction to investigate *and after notice to determine whether the claim be valid or not—"*

True, but the answer is that the *Land Department has not and will not enter* on such investigation and for the simple

reason such investigation would only determine the mining claims to be valid (and of great value) and that fact will be *presumed* until the entry is cancelled after *notice and hearing;* and the land department claims it has not jurisdiction but at the same time the department of the interior through its geological decision has, subsequently, examined the land and designates it as *mineral* as our bill alleged.

Such was the only argument of the defendant railroad company on this question. Therefore we contend that we are clearly in privity with the paramount title and have, at least, been in privity with the paramount title *ever since the moment of forfeiture and relocation,* and, we submit, that is sufficient to enable us to maintain our action under the added jurisdiction conferred on the federal court by section 738 of the California Code of Civil Procedure.

We do not consider it essential that we should have been in privity with the paramount title at the time the patent issued and in support of such contention we offer the following reasons and authorities.

If at the time the patent issued the legal title passed thereunder we admit that only persons holding an antecedent equitable title could impress a trust on the patent owing to fraud, imposition and mistake in instances of a *voidable patent issued, within* the

jurisdiction of the land department, for land wholly owned by the United States, but in all the cases cited by counsel under such contention *the legal* title of the United States *had passed* under a patent: the cases cited by the defendants in such connection were: *Kemp case*, 104 U. S. 639; *Steel case*, 106 U. S. 447; *Hartman v. Warren*, 76 Fed. 157; *Deweese v. Reinhard*, 61 Fed. 777; *Carter v. Thompson*, 65 Fed. 329; *Jameson v. James*, 155 Cal. 275; *Peabody etc. v. Gold etc.*, 111 Fed. 817; *Bear v. Luce Fed. cases* No. 1179; *New Dunderberg v. Old*, 79 Fed. 598; *Nielson v. Champagne etc.* 119 Fed. 123; *Oregon etc. v. Deschutes etc.*, 172 Fed. 738; *Lee v. Johnson*, 116 U. S. 48-53; *Sparks v. Pierce*, 115 U. S. 408; *Meader v. Norton*, 11 Wall. 442-458; *Johnson v. Towsley*, 13 Wall. 72; *Silver v. Ladd*, 7 Wall. 219-228; *Warren v. Van Brunt*, 19 Wall. 646; *Moore v. Robbins*, 6 Otto 530, 539; *Shepley v. Cowan*, 1 Otto 330-340; *Marquez v. Frisbie*, 101 U. S. 473-479; *Bohall v. Dilla*, 114 U. S. 47-51; *Maxwell Land Grant case*, 121 U. S. 380-381; *Knight v. U. S. Land etc.*, 142 U. S. 161-216; *Monroe etc. v. Becker*, 147 U. S. 47-59; *In re Emblen*, 161 U. S. 52-57; *Duluth etc. v. Roy*, 173 U. S. 587; *Emblen v. Lincoln etc.*, 184 U. S. 660-664; *Manning v. San Jacinto Tin Co.*, 9 Fed. 727-735; *Scott v. Lockey etc.*, 60 Fed. 34-37; *Campbell v. Weyerhaeuser*, 161 Fed. 332-334.

None of the cases are at all in point except as a converse proposition and in that way each of them is strictly in our favor.

None of these cases hold it necessary for a complainant to be in privity at or prior to the time the attacked patent issued except in those instances where it is sought to impeach the patent by charging it with a trust—In that case the United States could in a direct suit cancel the patent or the antecedent title could impeach the patent and impress on it a trust but we seek to do neither—we simply ask an interpretation of the patent in an action to quiet title under the allegation that the patent was *void* and did not pass the legal title; *or that under the mineral exception the legal title did not pass,* not as in the above cases that the patent was merely voidable and did not, as those cases, operate to pass the legal title.

The Right to Attack.

Constant s u g g estion was made by counsel in the courts below that conceding this complainant was right in all his contentions, he could not maintain this suit as the remedy was entirely in the hands of the government and, in any event, required a direct suit which, they contended, could only be maintained by the United States and that, as a matter of

law, this complainant was a stranger to all the transactions he was complaining of.

We contend we are entitled to maintain this suit under the circumstances and for the following reasons:

1. By force of the mineral exceptions inserted in the patent according to law and pursuant to the express agreement of the United States and the defendant railroad company.

We assume this proposition to be self-proving: if the mineral exception was lawfully inserted in the patent the legal title to the lands in controversy remained in the United States and, being mineral lands, were part of the public domain and subject to location under the mining laws of the United States.

2. By reason of the known mineral character of the controverted lands and independent of the mineral exception, the legal title did not pass under the patent which was void and not voidable.

This proposition is based on the cases of *Van Ness v. Rooney*, 160 Cal. 131; *Looney v. Scott*, 112 Pac. 173; *Kansas City M. & M. Co. v. Clay*, 3 Ariz. 326; *Old Dominion M. & M. Co. v. Haverly* (Ariz.), 90 Pac. 336; *Garrard v. Silver Peaks*, 82 Fed. 578, S. C. 94, Fed. 989; *Stoddard v. Chambers*, 2 How. 284; *Hosky v. Moran*, 178 U. S. at pp.

211-212; *Deffeback v. Hawke,* 115 U. S. 392; *Gold Hill Mining Co. v. Ish,* 5 Ore. 104; *Davis v. Weibbold,* 139 U. S. 507; *Morton v. Greene,* 88 U. S. 660; *which were all instances of collateral attack,* and while the attack sometimes failed, owing to the facts the doctrine was in each instance squarely laid down that a United States patent for land known to be mineral at the time of purchase *was void* and not voidable, and it is elementary that the legal title of the United States does not pass under a void patent and that a void patent may be attacked and avoided in any action where it is the basis of the prosecution or defense.

Williams v. S. P. Co., 153 Cal. 44.

3. By reason of the known, prior, valid, subsisting, recorded mining locations, the lands in controversy were segregated from the public domain and not subject to patent; and that thereby the patent to the defendant railroad company was *void* and not voidable and was not issued within the jurisdiction of the land department.

a. The recordation of the mining location was legal notice to all the world.

U. S. v. C. P. R. R. Co., 84 Fed. 221.

On the general proposition, see:

Burfenning Case, 163 U. S. 321;
Noyes v. Mantle, 127 U. S. 349-351;
Haws v. Victoria etc., 160 U. S. 303;
St. Louis M. & M. Co. v. Montana, 171 U. S. 650-55.

4. If the patent being void it was validated as against the United States by the federal statute of limitations under the theory of the Chandler-Dunbar Case, it was validated as whole, including the mineral exception, as such patent as validated would convey just what was contemplated by the granting act of July 27, 1866, namely, *non*-mineral lands, and thereunder the legal title of the lands in controversy would remain, subject to mining locations, in the United States.

5. We submit, that in any event, the patent is subject to direct and collateral attack by reason of the fact that the patent is not conclusive under the rule of the *Barden* case relating to lack of jurisdictional recitals and further lack of a statement or declaration of the agricultural non-mineral character of the lands described in it.

It was urgently contended by counsel in the courts below that only the United States or one in priority with the

paramount title *at the time* of the issuance of the patent could be heard to complain, but we based our attack on the patent, in this instance, on the solemn language of this court in the *Barden* case that until the land department, after examination and decision, issued a patent *containing* such a statement the land department would not have complied with the law, with the act of congress in relation to a patent issuing under a railroad land grant, and it is elementary that a patent that does not, in its issuance, comply with the law *is void*, not voidable, which result only arises in cases of fraud, imposition, inadvertence or mistake. A patent issued in violation of the terms of the law *is always void*.

6. That it appearing from the face of the patent and from the antecedent record in the land office that there was no prior decision of the question of fact of the mineral quality of the land, the patent is not the result of a judgment or decision of a question of fact relating to the quality of the land and is not conclusive of such question, and the mineral exception repelling any inference that the land department decided antecedently or otherwise that no legal subdivision of the controverted land was not mineral in character, as per opinion of Judge Bean, *supra;* that thereby the legal title to such of the lands embraced in the patent as are min-

eral in character did not pass from the United States.

a. We raise the question of the mineral exception under this point on the additional ground, that independent of all questions, it is a declaration of the land department that it issued the patent in violation of law and of its duty in failing "to primarily determine" the quality of the land and that, therefore, the patent is void, not *voidable.*

7. Our main reason for our contention will be fully argued under the main question, the seventh, certified to this court.

Before passing to the seventh and controlling question certified to this court we will take up the question of the mineral character of petroleum, which is the fifth question certified to this court.

It reads as follows:

"IS PETROLEUM OR MINERAL OIL WITHIN THE MEANING OF THE TERM MINERAL AS IT IS USED IN SAID ACTS OF CONGRESS RESERVING MINERAL LAND FROM THE RAILROAD LAND GRANTS?"

It will be observed, in the first instance, that the Circuit Court of Appeals speaks of petroleum as *"mineral oil."*

Long before the grant to the defendant railroad land grant was made

the congress reserved "In all cases lands valuable for *minerals*" and provided "*All valuable mineral* deposits * * * are hereby declared to be free and open to exploration," and later the congress provided:

> "No act passed at the first session of the 38th congress, granting lands to states or corporations to aid in the construction of roads * * * shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States unless otherwise *specially* provided in the act or acts making the grant."

The Act of July 27, 1866, made a grant to the defendant railroad company of lands

> "'not mineral'; * * * provided further that *all* mineral lands be and the same are hereby excluded from the operation of this act * * * shall not be held to include iron or coal."

The congress also defined "placers" as including *all forms* of deposit, and the Act of February 11, 1897, provided that

> "* * * may enter and obtain patent to lands containing *petroleum or other mineral oils* and chiefly valuable therefor under the provisions of the law relating to placer mineral claims."

This court will observe that the act recognized petroleum as a min-

eral and did not by statutory authority direct it to be classed as a mineral. This is apparent as it speaks of "petroleum *or other mineral oils*" and consequently it must be taken that the act was only declaratory of the law and of the fact. The right to locate under the placer act is specifically limited to "petroleum or other *mineral* oils," not to petroleum and other oils.

Congress, independent of the fact or scientific authority, may say what shall be considered as a mineral, just as it had the right to say in the granting act that "iron and coal" shall not be held as "*mineral*" within the contemplation of the act.

This view is amplified by the Act of January 31, 1901, which permitted lands containing *salt springs* or deposits of salt in any form to be taken up under the placer laws. The act did not make *salt* a mineral, but removed the prohibition that had existed up to that time that prevented the acquisition of saline lands.

Coal has never been *defined* or designated by the congress as a mineral any more than petroleum, but the courts have ever considered that "all mineral lands" to be these which as a matter of fact contained any form of mineral that made the land more valuable for mining than for agriculture.

The argued contention of the defendants in the courts below was

that "Petroleum or oil is not within the meaning of the term 'mineral' as it was used in the act of congress reserving mineral land from railroad land grants and oil bearing lands are not reserved from such grants."

No authority was cited in support of the proposition and the defendants said only:

"The effort of the complainant in this case to secure the title to the land described in the amended bill of complaint is prompted by the belief that such lands are valuable because of petroleum or oil supposed to be contained therein. Whenever the question is presented in any case *so that it may become material,* we shall present to the court our views to support us in the contention that petroleum or oil is not a mineral within the meaning of the term as it was used in the act of congress herein in question. No valid reason can be suggested why, if congress intended the railroad company to have the benefit of any coal or iron lands within the limits of the grant, it should not also have the benefit of any oil or petroleum within such grant, as oil or petroleum is as essential to the business of a railroad as coal or iron; and was not a 'mineral' within the meaning of the term as it is used in the granting act?"

It will be observed that the defendants do not allege that petroleum is not a mineral in fact, but alleges that no good reason exists why congress should not have granted the oil lands to the railroad company in view of the fact that the railroad company

"needs" the petroleum or mineral oil in its business.

The plainest and most natural answer to the observation is, as it must be apparent to this court, that if the congress wished or desired that the railroad should have received under the grant "petroleum or other mineral oil" land the congress would have said so and cut out of the exception of "all mineral lands," in addition to coal and iron lands, "all lands bearing petroleum or other mineral oil lands."

Congress, when it made its first grant to the Northern Pacific Railroad Company, did not exclude mineral lands from the grant, and the outcry throughout the country, as evidenced by the subsequent debates in congress, was so great that the congress again took up the subject and resolved to cut out all mineral lands, but on reflection and after debate and consideration modified the exception of "all minerals" so that the exception should not be construed to include coal and iron lands. Many other things besides coal and iron are needed in the business of a railroad, such as copper for the telegraph lines, which land grant railroads were required to construct under the granting acts; granite and other building stone for its bridge and roadbed foundations, cement for its superstructures, mineral paints for painting its equip-

ment, but none of such minerals were cut out of the mineral exception.

The construction of the grant in every instance and under all circumstances *must be resolved against the defendant railroad grantee* and the intent of congress must be derived from the plain text of the grant, and this court will not delve into the mind of congress in search for a supposition that congress intended something different than its will as explicitly expressed in its grant. Whether congress would have cut petroleum or other mineral oils out of the mineral exception of the grant if its attention had been specifically called to its mind that the railroad company needed petroleum or other mineral oils in its business, is not for this court to say, as such a course would be wholly transferring the legislative functions of congress to this court, and would permit this court to give to the railroad company, by way of legislative action, mineral lands worth half a billion of dollars and which congress in 1866 refused to give to the defendant railroad and which proposition today would involve in complete political ruin and destruction any public man that even dared to advocate such a proposition.

The proposition of the defendants in such connection has absolutely no

foundation in reason, and in our opinion is simply another anchor to the windward.

We fully recognize the right to every litigant to fence for safety, to manoeuvre for position and advantage, but we submit the defendant went very far, in the courts below, when they contended that the will of congress could be evaded by an arbitrary decision that "coal and iron means coal, iron and petroleum or other mineral oils."

It will be necessary for this court so to do in order to uphold the contention that "petroleum or other mineral oils" are not minerals in contemplation of the act of congress because the defendant railroad company "needs petroleum or other mineral oils in its business"; that is the only argument advanced by the defendants on this subject.

That congress intended just what it said is plainly expressed by this court in *Soderberg v. N. P. R. R. Co.*, 188 U. S. 526, where it was held that granite was a mineral and that granite bearing lands were excluded from the railroad land grant under the exception of "all minerals" and that such lands could be taken up under the placer mining laws.

The argument in that case was presented on the part of the United States by Mr. Justice Van De Venter, then an

assistant United States attorney general. Amongst other things he contended:

> "The term 'mineral lands' and terms of like import, whenever used in the acts of congress making railroads or other land grants, or in the mining laws, either as words of reservation or as authorizing the disposal of the lands thus described, have the same meaning and same breath of signification. (*Davis v. Weibbold*, 139 U. S. 507; 1*Lindley Mines*, Secs. 86, 152, pp. 92, 170.)"

Coal lands are "mineral lands" within the meaning of the term as used in statutes regulating the disposition of the public domain. (*M'ullan v. U. S.*, 118 U. S. 271.)

Lands valuable for mineral, whether of the metallic or non-metallic class, are subject to location, entry and purchase under the provisions of the mining laws and are also within the exception of "mineral lands" from railroad land grants. (*Hooper's Case*, 1 L. D. 560; *Maxwell v. Briely*, 10 Copp's Landouver 50; *Lindley Mines*, Secs. 96, 98, 137, 158, 162; *McGlenn v. Wienbroeer*, 15 L. D. 370; *Van Doren v. Plested*, 16 L. D. 508; *Hayden v. Jameson*, 16 L. D. 508; *Shepherd v. Bird*, 17 L. D. 82; *Gary v. Todd*, 18 L. D. 58; *Gibson's Case*, 21 L. D. 327; *Union Oil Co. Case*, 25 L. D. 354; *Pacific Marble Co. v. N. P. R. R. Co.*, 25 L. D.

233; *Alldritt v. N. P. R. R. Co.*, 25 Land Dec. 349; *In re Florida etc.*, 26 L. D. 600; *Richter v. Utah*, 27 L. D. 95; *McQuiddy v. California*, 29 L. D. 181; *Tulare Oil Co. v. S. P. R. R. Co.*, 29 L. D. 269; *Beaudette v. N. P. R. R. Co.*, 29 L. D. 248; *Schrimpf v. N. P. R. R. Co.*, 29 L. D. 327; *Morrill v. N. P. R. R. Co.*, 30 L. D. 475.)

Nothing passes by implication under grants of a public nature *but in the clear and explicit* language of the grant *must* be found all that is *conveyed* by it. When doubt arises the grant *must* be construed most strictly against the grantee. (*D. & P. R. R. Co. v. Litchfield*, 23 How. 66; *Slidell v. Grandjean*, 111 U. S. 412; *Barden v. N. P. R. R. Co.*, 154 U. S. 288.)

The value of a mineral deposit rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law. (*Pacific Coast etc. v. N. P. R. R. Co.*, 25 L. D. 233.)

Petroleum is a mineral. (*Gill v. Weston*, 110 Pa. St. 312; *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; *Hague v. Wheeler*, 157 Pa. St. 324.) Natural gas is a mineral. (*Re Natural Gas Co.*, 73 Fed. 191.)

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are non-destitute of and incapable of supporting animal or vegetable life.

In this view it will embrace as well the bare granite of the high mountain as well as the deepest hidden diamonds and metallic ores. (*Bainbridge, Mines,* pp. 1, 2.)

"Mineral" in its general legal sense is any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil. (*Barringer and Adams, Mines,* p. LXXVI.)

The mining laws from their earliest history have been administered by the land department as applicable in all their force and effect to the public mineral lands within the limits of railroad land grants. (*C. P. R. R. v. Valentine,* 11 L. D. 238.)

The term "minerals" standing alone and as understood in mining law, generally comprehends and includes all the substances in the earth's crust which are sought for

and removed by man for the substance itself. (1 *Snyder Min.*, Secs. 134, 140, 143, 145; 2 *Id.*, Sec. 926.)

Before passing to the *Soderberg case*, which upheld all the contentions made there, Asst. Atty. General Van De Venter will cite a few additional authorities concerning petroleum treated solely as a mineral.

In *Thornton on Oil and Gas*, section 18, the author says:

> "Whatever may have been thought of oil or natural gas at one time (*Dunham v. Kirkpatrick*, 101 Pa. St. 43), it is *now established beyond any question that * * * petroleum * * * is a mineral and judicially must be so treated.* (*Murray v. Allred*, 101 Tenn. 100, and numerous other cases cited in footnote.)"

At section 304 he said:

> "A clause in a deed of conveyance reserving 'all minerals' has been held not to include petroleum. (*Dunham v. Kirkpatrick*, 101 Pa. St. 36.)"

But this decision has been greatly shaken in the state where it was rendered by a subsequent decision (of the same court) holding that petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may be designated as mineral lands. (*Gill v. Weston*, 110 Pa. St. 312.)

In *Murray v. Allred,* 100 Tenn. 100, in case of a reservation in a deed of conveyance of "all mines, minerals and metals in and under the land," it was held that petroleum was a mineral and included in the reservation.

In an early Pennsylvania case it was said: "Oil is a mineral, and being a mineral is part of the reality." (*Funk v. Haldeman,* 53 Pa. St. 229.) Practically the same language was used in *Williamson v. Jones,* 39 W. Va. 231, defining petroleum as a mineral, and in *Union Oil Co. Case,* 25 L. D. 351, arising under the Southern Pacific Railroad land grant, it was decided that petroleum was included in the mineral exception that is under consideration here.

It is true that the earlier Pennsylvania case holding that petroleum is not a mineral is partially supported by an Ohio decision (*Detlor v. Holland,* 57 Ohio St. 492), but it was said in the latter case: "There is nothing to show it was the intention of the parties that oil should be included in the conveyance."

It will be noted, however, that in the construction of a railroad land grant *all doubts are to be resolved by this court against the railroad grantee,* and if consequently this court should conclude to pass on the "inten-

tion" of congress as to whether or not the congress "intended" to contemplate petroleum as a mineral that should be included in the mineral exception, the rule of construction requires this court to find that it was the intention of congress to exclude "petroleum or other mineral oil" from passing under the grant.

In the *Soderberg case* this court at page 529 (188 U. S.) said:

> "We are thus brought to the main question in the case, viz., whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864."

The 3d section of the Act containing the granting clause of land "not mineral" also contains the following provisions: "Provided, further, that all mineral lands be and the same are hereby excluded from the operations of this Act * * * and provided, further, that the word 'mineral' when it occurs in this Act shall not be held to include coal and iron." The *inference* from this proviso is that in the absence of a special provision both iron and coal would be considered mineral, and this, to repel the idea that only metals were included in the word "mineral," must be construed as synonymous with metallitens.

Upon the other hand sec. 2 declared that "the right, power and au-

thority is hereby given to said corporation to take from the public lands adjacent to the land of said road material of earth, stone, timber, etc., for the construction thereof."

There is a possible inference from this that stone was not to be regarded as a mineral although it is more likely that a grant was intended of all material serviceable in the construction of the road even though it might otherwise be excepted from the grant as a mineral. Taking these two sections together, it would seem that the reason for providing in the 3d section that iron and coal lands should not be deemed mineral was the same as the liberty given by the 2d section to take materials of earth, stone and timber; namely to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, *dependent on the context,* that the ordinary definitions of the dictionary, throw but little light upon its signification, in a given case.

Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom and therefore could not be excepted from the grant without being destruction to it—Upon the other hand, a definition which would

confine it to the precious metals—gold and silver —would so limit his application as to destroy at once half the value of the exception—Equally subsersive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust" and that of Banelnedge on Mines: "all substances which now form or once formed, a part of the solid body of the earth."

Nor do we approximate much more closely to the meaning of the word by treating mineral as substances which are "mined" as distinguished from those which are "quarried." Since many valuable deposits of gold, copper iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the casen stone in France is excarted from mines running far beneath the surface—This distinction between underground mines and open workings was expressly repudiated in Midland etc. v. Haunchwood etc. L. R. 20 Ch. Div. 552, and in Hext v. Gill L. R. 7 Ch. App. 699.

The ordinance of May 20, 1875, authorizing the sale of lands in the Western Reservation of "one third part of all gold, silver, lead and copper mines to be sold or otherwise disposed of, as congress shall hereafter direct," was evidently intended as an assertion of the right of the government to a royalty upon

the more valuable metals. * * * A division of lands into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral" since most of the lands included in the limits of the grant are neither one or the other but desert or rocky land of no present value for agriculture and of little value for their mineral deposits—So, too, the general reservation in the easier acts of congress of lead mines, and saline springs seems to have been dictated by the fact that those were the only valuable minerals known to exist in the states to which the acts were applied while in Michigan and Wisconsin there was a similar reservation of copper, lead and other valuable ones which were just then being discovered and made available.

In the earlier grants of congress to railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, *through unsurveyed and almost unknown territories*, a reservation was invariably made of lands suspected of being rich in metals.

It is quite true, had it not been for the actual or suspected presence of such metals, congress might not have decided it worth while to reserve the non-metallic mineral lands: *but when* its attention was called to the fact that valuable mines might exist along lines of these roads, as it appears to have been in about

1860, *its policy was changed* and not only metalliferous, but all *mineral lands* were reserved. * * * Considerable light is thrown upon the congressional definition of the word "mineral" by the acts subsequent to the Northern Pacific Grant of 1864 and prior to the definite location of the line in 1884 * * the first of these acts that of July 26, 1866, (the day before the Southern Pacific Railroad Grant) declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the *local* customs or rules of miners in the several mining districts—The 2d section provides that whenever any person or association of persons claim a vein or lode of quartz or other rock in place, bearing gold, cinnabar or copper, he shall be entitled to enter such tract and receive a patent therefor, upon *complying with certain preliminaries* and with a right to follow such views into adjoining lands—

The argument made in this connection by the railway company would confine the terms "mineral lands" to lands bearing gold, silver, cinnabar or copper which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, etc.,—a limitation wholly inconsistent with the use of the word "mineral" in the 1st section. * * *

Indeed, by the very terms of the granting act of July 2, 1864, not only were all mineral lands excluded, but the grant is limited to those lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption and other claims or rights, *at the time the line of said road is definitely fixed* and a plat thereof filed in the office of the commissioner of the general land office"—It results from that that if, before the definite location of the road, congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the *indemnity* limits of the grant.

In construing this grant, we must not overlook the general principle *announced in many cases in this court*, that grants from the sovereign *should receive a strict construction*—a construction which shall support the claim of the government rather than that of an individual. *Nothing passes by implication*, and unless the language of the grant *be clear and explicit as to property* conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the land department to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation and almost

uniformly, particularly of late years, have been strong to support the theory that the words "valuable mineral deposits" should be construed *as including all lands* chiefly valuable for other than agricultural purposes and particularly as including non-metallic substances, among which are held to be * * * PETROLEUM * * *. In *Funk v. Holdeman*, 53 *Pa. St.* 229 *and Gill v. Weston*, 110 *Pa. St.* 313, *petroleum was held to be a mineral*, although the act authorizing the lease of mineral lands was *passed before petroleum* was discovered—See also *Gird v. California Oil Co.*, 60 Fed. 531—The same principle was extended in *Westmoreland & Co. Natural Gas Co. v. DeWitt*, 130 Pa. St. to natural gas which was said to be a mineral *ferae naturae* * * *

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult so to do—It is sufficient to say that we see nothing in that act or in the legislation of congress up to the time this road was definitely located (1884) which can be construed as putting a different definition upon these words from that generally accepted by the text on the subject—Indeed, we are of opinion that this legislation is consistent with, rather than opposes, the *overwhelming* weight of authority to the effect *that mineral lands include,*

not merely metalliferous lands *but all such as are chiefly valuable for their deposits of a mineral character* which are useful in the arts or valuable for the purposes of manufacture."

"Valuable for purposes of manufacture." It would be impossible within the confines of this brief to enumerate "the purposes of manufacture" for which petroleum is the base; amongst them, light, heat, power, electrical development and a thousand bi-products! used in the arts, sciences, medicine!

And why is petroleum "needed in the business of a railroad"? Only for the purposes of *economic waste,* a very crime against civilization! as stated not only by Rockefeller but by every authority on the subject in the world.

To burn petroleum in the furnaces of a locomotive should be made a felony and the time is fast approaching when as recommended by the United States officials petroleum will be made a public use and its production and uses regulated.

Now what is the contemporaneous construction of the land department and the courts as to defining petroleum as a mineral that exclude petroleum bearing lands from passing under the railroad land grants even prior to the adoption of the act (Feb. 11, 1897)

extending the placer mining act to petroleum bearing grounds.

The land department on Nov. 6, 1897, and subsequent to the petroleum location act fully passed in the question.

It appears that in January, 1894, the Union Oil Co. made a mineral entry on certain land and the S. P. R. R. Co. and the railroad company protesting the mineral claimant was "required to show a discovery of a valuable deposit of mineral * * *, that the lands containing *"petroleum"* were not mineral lands within the meaning of the term as used in the act of July 27, 1866.

In the opinion of the land department it was said:

> "In the decision complained of it was held in substance and effect:
>
> "That lands containing petroleum are not subject to location and entry under the mining law.
>
> "That such lands do not fall within the meaning of the exception of 'all mineral lands' from the grant of the railroad company: and * * * In view of the allowance by the local office of the mineral entry, and in absence of any showing to the contrary, it will be assumed the lands are chiefly valuable for the deposits of *petroleum* they contain and in that respect the entry was regular, if such lands are subject to mineral entry at law—
>
> "Upon this question the theory of the decision complained of ap-

pears to be that only lands containing metallic substances such as gold, silver, cinnabar, lead, tin, copper and deposits of like nature were within the contemplation of congress in the enactment of the mining statutes and in making the exception of 'all mineral lands' from the grant to the railroad company: that scientifically speaking, *petroleum* is a mineral yet it is not such a mineral as to render lands containing it, and chiefly valuable on account thereof, subject to entry under the mining laws, or to exclude them from the grant to the railroad company—It is insisted by the mineral claimant, both as a matter of original construction, *and under* the *uniform* practice of the land department for over *twenty years in permitting oil lands* to be entered and patented under the placer mining laws, that said decision is wrong and should be revoked.

"The provisions of the mining statutes, as at present codified from the Act of May 10, 1872, (17 Stat., 91-2), and other acts on the subject, are to be found in the Revised Statutes, sections 2318 to 2352, inclusive.

"Section 2318 provides that:

"'In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.'

"Section 2319 provides that:

"'All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in

which they are found, to occupation and purchase * * * under regulations prescribed by law, and according to the local customs and not inconsistent with the laws of the United States.'

"Sections 2320 to 2328, inclusive, prescribe rules and regulations to govern the location of 'mining claims upon veins or lodes or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,' and provide the matter of obtaining title from the government for such mining claims.

"By section 2329 it is provided that:

" 'Claims usually called "placers," including all forms of deposit, excepting veins of quart, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims.'

"It is under this last section that the application for patent by the mineral claimant is preferred.

"The first department circular on the subject of the mining laws, was issued by Commissioner Drummond of the general land office, on July 15, 1873. (Copp's Mineral Lands, 61.) In defining what constitutes 'A valuable mineral deposit' within the meaning of those laws, the commissioner said:

" 'That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agricul-

ture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.'

"It was further stated:

" 'The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that congress intended it as a general mining law, "to promote the development of the mining resources of the United States" and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands.'

"In answer to certain inquiries which gave rise to the circular, it was said:

" 'I therefore reply that lands valuable on account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining Act of May 10, 1872.'

"Following this circular, on January 30, 1875, it was held by Commissioner Burdett, that lands containing valuable deposits of petroleum may be entered under the mining act of 1872 (Sickles' Mining Laws, 491); and on March 31, 1882, Commissioner McFarland, after stating that 'lands containing deposits of petroleum have been entered as placer and patented as such,' held 'that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims.'

"In the case of *W. H. Hooper* (1 L. D. 560-1881), the views expressed in the circular of July 15, 1873, were concurred in and approved by Secretary Kirkwood. And in the case of *Maxwell v. Brierly,* Secretary Teller, after referring to said circular with approval, held that lands containing deposits of gypsum and limestone. * * * asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, *petroleum,* slate, and other substances,' when more valuable on account of such deposits than for agricultural purposes, *are subject to the operation of the mining laws.*"

Such are some of the reported rulings and decisions of the land department, made shortly after the mineral land laws became a part of the public land system, and by the officers of the government, charged with their administration. As contemporaneous and uniform interpretation, they are entitled to great consideration.

From an examination of the records of your office, which I have caused to be made, it is ascertained that ever since the circular of July 15, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their *deposits of petroleum,* under the law and regulations relating to placer claims, has been continuous and uniform. Under this practice a large number of patents have been issued, a very large and valuable property interests have been

acquired. Until the decision in this case, the correctness of the practice does not appear to have been questioned, and for that reason no case distinctly presenting such a question ever reached this department. The case of the *Piru Oil Company* (16 L. D. 117) was a contest between said company as applicant for patent under the mining laws, for several "oil mine" claims, and a homestead entryman of a part of the lands embraced in the mineral locations; but no question as to whether the lands were of the character subject to mineral entry, appears to have been discussed. The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry is therefore not without weight. The case of *Roberts v. Jepson* (4 L. D. 60) was a similar contest. It was there held by Secretary Lamar that the mineral claimant had "failed to establish the character of the land *as oil land*, and, therefore, subject to location under the mineral laws."

Sufficient has been said to show that *ever since the circular of July* 15, 1873, until the date of the decision under review, the practice of the land department has uniformly been to allow entries under the mining laws of lands containing *valuable deposits of petroleum,* and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. Such having been the generally accepted view for so long a time, and extensive property rights having been acquired under the law as thus construed by the officers of the government whose duty it was to administer it, the demands of simple justice would seem to require that there should be no departure from that construction at this late day, unless called for by the clearest evidence of error, as well as the strongest reasons of public policy.

In the case of *United States v. Moore* (95 U. S. 760) the Supreme Court said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

And in *Brown v. United States* (113 U. S. 568) it was held that:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect."

These authorities are directly in point, and in view thereof, the construction in question, even though it were regarded of doubtful correctness, as an original proposition, should, in my judgment, be sustained.

It is proper in this connection to refer to the Act of February 11, 1897, *supra,* passed soon after the decision under review was rendered. By that act it was provided:

> "That any person authorized to enter lands under the mining laws of the United States, may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims; *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage thereof."

The language of the act clearly indicates, *and the debates of Congress,* as well as the report of the *Public Lands Committee of the House on the bill,* unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and, *inter alia,* it was said:

> "Public lands containing *petroleum* and other mineral oils have been held and patented under the placer mining acts of the United States for many years past * * * The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the general land office; *so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties.*"

This legislative action, so promptly taken atfer the departure from the earlier rulings and the long established practice thereunder, is significant, and can hardly be considered as less than a disapproval by congress of the changed ruling.

Several cases were cited in the argument from the Supreme Court of the

state of Pennsylvania, on the question as to whether petroleum is a mineral within the meaning of certain mineral reservations in contracts and deeds of conveyance between private parties. One case is quoted from quite extensively in the decision under review. *None of these cases*, however, involved the meaning of the word "mineral" or the term "mineral lands," as used in the public land laws, or in grants to railroad companies. They cannot be relied upon, therefore, as controlling precedents, or, in my judgment, as persuasive authority of much weight, in the decision of this case. In the case of Gird *et al.* v. California Oil Company, decided in 1894, by the United States Circuit Court for the southern district of California (60 Fed. Rep. 531), certain lands containing valuable deposits of oil were involved. Each party to the controversy asserted claim under the mining laws, and the suit was to determine the right of possession. In its opinion the court said:

> "The premises in controversy *are oil bearing lands*, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."

The right of possession was adjudged to the defendant; and it will be observed that the adjudication was *under the then existing* mining laws, relating to placer

claims. This was in entire harmony with the contemporaneous and long continued construction by the Land Department, as hereinbefore shown.

In the recent case of Pacific Coast Marble Company v. Northern Pacific Railroad Company and State of Washington (25 L. D. 233) the direct question as to what are "mineral lands" within the meaning of the mining laws and the exceptions contained in railroad and other land grants by congress, was involved. After an elaborate and exhaustive consideration of the subject, the department there decided to adhere to the rule:

> *"That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."*

And it was further held:

> "That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the

exception from the grants to the railroad company and to the state."

Congress, by the Act of February 11, 1897, *supra, expressly recognized petroleum as a mineral oil,* and it was not disputed in the argument that the same is recognized as a mineral by the standard authorities on the subject, nor is it denied that the lands in question are chiefly valuable on account of the deposits of petroleum contained in them. They, therefore, come clearly within the principle and rulings of the case last cited, the discussion in which it is not necessary to repeat, and in view thereof, as well as of the long continued practice of the land department in permitting the entry *and patent of oil lands as mineral,* as hereinbefore set out, it must be held that they are lands of the character subject to entry under the mining laws; and for that reason the portion thereof situated in section 1, *could not be legally selected as indemnity by the railroad company even if its right to select the same were otherwise conceded.*

"These conclusions render it unnecessary to discuss the matter of the confirmatory operation of the Act of February 11, 1897, *supra.*"

The opinion in that noted land office decision was written by Mr. Justice Van De Venter at a time he was writing the opinions of the department of the interior under his detail as assistant attorney general, and the opinion was practically adopted by this court in the *Soderburg case.*

Petroleum is conceded to be a mineral by every scientific authority in the world; it is classed as a mineral by every mining state that has a metallurgical bureau; every standard textbook designates it as a mineral; all the products of petroleum, a thousand in number, are minerals.

Porter v. Mack etc., 65 W. Va. 636;
Sult v. Hochtetter, 63 *id.* 317;
Williamson v. Jones, 39 *id.* 231;
Westmoreland v. De Witt, 130 Pa. St. 235;
Moore v. Griffin, 72 Kan. 164;
Bee v. Barnes, 149 F. 727;
Barnes v. Bee, 138 F. 476.

The seventh question certified to this court reads:

If the mineral exception clause was inserted in the patent with consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the interior department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company estopped to deny the validity of the clause?

It is the main question in the suit and while scant reference was made to it in the courts below it was constantly in view

and the Circuit Court of Appeals recognizing its importance certified it to this court.

We present it in its dual aspect (a) that the mineral exception was legally and validly inserted in the patent under the authority of the granting act and the patent being accepted by the defendant railroad company it had the effect of retaining the legal title to the lands in controversy in the United States, and (b) that the mineral exception having been inserted in the patent pursuant to the assent of the defendant railroad company and pursuant to the agreement between the United States and the defendant railroad company, the effect of the same and of the acceptance of the agreed patent, independent of any statutory authority to insert the same in the patent, is to retain the title to the controverted lands in the United States, and to estop the defendant railroad company from denying that the legal title to the lands in controversy remains in the United States thereunder. *Judge Ross did not pass on the question* and the judges of the Circuit Court of Appeals, as appears from their certificate, divided in opinion concerning the same.

In discussing this question it must be remembered by this court that, in any event, the mineral exception gave full and complete expression of the intent of the statute that neither known or unknown mineral

lands should in any event, directly or indirectly, pass to the defendant railroad company. That the mineral exception is consistent with public policy, good morals and the will of congress must be admitted, as it must further be admitted that in no event would any damage or loss result to the defendant railroad company by exception of all mineral lands as the law reserved to it a right of lieu selection of other lands of an agricultural nature, sufficient in amount and *character* to compensate the defendant railroad company for the areas lost to it in the primary grant through the discovery that certain lands therein were mineral in character.

On Feb. 1, 1912, as stated by the Dept. of the Interior there was 1,200,000 acres of lieu land still available to the defendant Railroad Co.

The mineral exception is consistent with morals, good faith, fair dealing and common honesty, while the position of the defendant railroad is that notwithstanding it could not in any event legally claim the admittedly mineral lands, of immense value, under the granting act and should not be permitted to claim any lands under its agreement, that, nevertheless through the mere issuance of the excepted and reserved and agreed reserved and excepted patent it must be presumed by this court that the lands in controversy are agricult-

ural in character and more valuable for agriculture than for mining purposes.

The position of the defendant railroad company is inconsistent with the granting act, inconsistent with the excepted patent, inconsistent with the antecedent record, inconsistent with the fact, inconsistent with its own solemn agreement, inconsistent with its acceptance of the excepted patent, inconsistent with its conduct in reserving from its grantees the claims of the United States to the lands as mineral lands, inconsistent with public policy, good morals, common honesty and the welfare of the nation, and can only be maintained by a fiction of law and fact. There is in this suit no innocent purchaser and no widow or orphan stands at the bar of this court asking that the public faith and credit be called on by this court to protect vested rights.

Neither may the defendant railroad company in this suit plead innocent investments of great or little or any amount as it has never been in possession of any portion of the lands in controversy which on the 2d day of March, 1909, were wild and mountainous and wholly without any agricultural value, unoccupied, without a token of physical domination and which it is apparent not a dollar has been expended by the defendants.

We are not here under this questior discussing the validity of the mineral exception, or whether or not it was legally inserted in the patent in controversy pursuant to express or implied statutory authority, but we are claiming that, on the record before this court, the insertion of the mineral exception inserted in the patent pursuant to the agreement and assent of the defendant railroad company and its acceptance of the patent after such agreement, estops it now from pleading that the mineral exception was not valid or from denying that thereby the title to the lands in controversy remains in the United States, and that the consideration for the insertion of the mineral exception in this instance was the issuance of a patent without antecedent examination or decision.

We have in another part of this brief pointed out what *Mr. Justice Field* in *LeRoy v. Jameson* said concerning the acceptance of a patent, showing that no one could be compelled to accept a patent.

It was clearly within the right of the defendant railroad company to refuse to accept the particular patent and *Mr. Justice Field* further pointed out in that case that the acceptance of a patent would not be presumed in the presence of expressed dissent! The only inference that may be drawn from the ac-

ceptance, without protest by the defendant railroad company, of the excepted patent *is* that it agreed to all its terms and conditions as expressly alleged in the *bills* of complaint herein.

Only recently (1911) the N. P. R. R. Co. returned an excepted patent to the land office with a protest against the inclusion in the patent of the mineral exception which the land department then as now, inserted in land grant patents! Why did not the defendant pursue such a course if it objected to the inclusion of the mineral exception in this particular patent?

If the defendant railroad company did not recognize the validity of the mineral exception why did it for years afterward insert in its deeds and agreements to convey lands this phrase, *"reserving all claim of the United States to the tracts above described as mineral lands"*? Why was that reservation carried in thousands of deeds and agreements to convey? There is only one answer and that is the defendant railroad company *knew* that the mineral exception inserted in the patent pursuant to its assent and pursuant to the agreement between it and the United States was in such respect a binding force and could not be disregarded.

We think it likely that as it is conceded that the exception in the patent

but gave expression to the intent of the grant and the exception in the grant, that the mere acceptance of such a patent estops and concludes the defendant railroad from denying the legal title remains in the United States *even* if *it were the fact* (as it is not) that the mineral exception was inserted in the patent without either the direction of the statute or consent and agreement of the defendant railroad company *as* the exception in the patent was but the expression of the statute. The case, in that particular, has only been passed on by this court by analogy. There is no direct statutory authority for various of the many exceptions contained in homestead, pre-emption and placer mining patents but they were inserted in such patents by the land department and upheld by the courts for the reason the exception is the expression and intent of the statute. For instance there is no direct statutory authority as pointed out by Judge Sawyer and others (*Paterson v. Ogden*, 141 Cal. 43) for the insertion in a homestead patent of an exception reserving to the proprietor of a penetrating ledge, in the land of another, to remove his on therefrom but such exception is universally upheld because it gives expression to the statute.

This court in *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 687, pointed out that an exception of viens and lodes in a

placer mining patent had no direct statutory authority, and went on to say:

> *"Without deciding on the effect of the acceptance without protest* of a patent with such exceptions in the granting clause, when their insertion is a *voluntary* act of the officers who execute the instrument, it is sufficient to say, *that those conditions but give expression to the intent of the statute."*

The exceptions in the *Davis-Weibbold* and *Deffebach-Hawke* cases, as rightfully decided by this court, did not give expression to their predicating statutes but were in direct opposition to the law as the statute and the law gives to the holder of a placer mining patent the *entire surface* of the land embraced within the boundaries of the patent and the exceptions in these two cases attempted to retain practically *all the surface* of the land which the land department had decided should pass to placer mining patent and of course the attempted exceptions were void as they did *not give expression* to the statute and it may be said that while upwards of a million of patents have been issued containing exceptions giving expression to the statute under which they issued *not a single one* though the statute did not expressly authorize the insertion of an exception in the patent, *not a single exception* has been overthrown by any court at any place or time ex-

cept by *Judge Smoyer* in *Cowell v. Lammers* and *Francouer v. Newhouse* in which he held that the exception at the bar of this court was void because it did not give expression to the intent of the statute and limited the grant because, as he said, *unknown* mineral lands passed to the railroad company under the land grant act and that the patent could not take away what passed by the grant and the subsequent destruction of such doctrine by this court in the *Barden case,* renders his opinion on that point *functus officio.*

Thus we have seen that Mr. Justice Field in *LeRoy v. Jameson* said that *no one was bound to accept a patent and its acceptance* would not be presumed in face of expressed dissent: we have also seen what the California Supreme Court said in *Gale v. Best,* "and it might strongly be argued that in such case (of a patent containing the mineral exception), although it was the duty of the land department to determine the character of the land before the issuance of the patent, yet as the patent shows upon its face that such duty was not performed, *the patentee must be held to have taken it knowing its uncertain and unstable character,*" and the patents the California Supreme Court were referring to were identical with ours, word for word, except in the description of the physical boundaries of the property.

When the land department (and we are speaking independent of agreement and assent), tendered this patent to the defendant railroad company *it was accepted without protest or dissent:* there was no appeal to the secretary of the interior or to the courts but complete acquiesence followed by the defendant railroad company reserving from its grantors and lessees, "in its deeds and conveyances" *all claims of the United States to the above described tract as mineral lands."* (See appendix, Ex. ....)

Suppose now the United States should attempt to recover from those grantees the lands sold to them by the defendant railroad company, will it be held that the defendant railroad company was not authorized to consent to the insertion of such a reservation in its deed and that having accepted the deed with such reservation, the grantee may now repudiate and is not estopped as denying as against the United States that the reservation in its deed from the defendant railroad company is illegal? And will it be contended here that such reservation having been inserted in such deeds by express agreement that either party may now contend that as against the United States the reservation in the deed is nugatory? And if it be not nugatory does not the legal title to the mineral subdivisions of the land conveyed remain in the United States?

And if the legal title remain in the United States are not the mineral subdivisions open to location under the mining laws of the United States? Otherwise, we submit, words have no meaning or are subject to arbitrary and unnatural ruling so that the law may move in its mysterious way its wonders to perform.

Recently the N. P. R. R. Co. (1911) returned to the land department a patent containing a reservation of known and unknown mineral lands and the N. P. R. R. Co. refusing to accept the patent returned to the land department asking for a corrected patent to its co-defendant or other grantee which conveyance contained (as they all did until about January 1, 1905) the phrase: "Reserving all claim of the United States to the above described tract as mineral lands," the railroad company contending the mineral exception was void, as, amongst other reasons, the land passing to the N. P. R. R. Co. under its grant had, pursuant to the specific direction of congress, been examined, determined and classified as mineral or agricultural land and the N. P. R. R. Co. contended that under such circumstances the insertion of the mineral exception was unauthorized and in a communication to the secretary of interior on the ..... day of ....., 1911, Attorney General Wickersham instructing that

the insertion of the mineral exception be contained in railroad land grants pointed out that railroad land grant claimants if not *satisfied* with the patents *tendered* them had their remedy of mandamus. This defendant railroad company has such a remedy but never sought it!

Counsel may argue that the jurisdiction of the land department over the land in controversy ceased on the issuance of a patent and it would be futile to ask the land department to again take up the question or to ask the land department to issue a proper patent. This court has *never decided* that in case of such a patent as ours the land department has lost jurisdiction of lands mineral in character. No court has held so; Secretary Hoke Smith did hold so in *Courtright v. W. C. R. R. Co.* but his reasoning is inexplicable and he was proceeding under his announced theory that the railroad company took its title by the grant, which is denied here by the defendant railroad company and if Secretary Smith was right the defendant railroad company is necessarily wrong.

We must anticipate all possible conjectures on part of the defendants and therefore will take this part of the subject up in an affirmative way. We say:

IT WAS COMPETENT FOR THE DEFENDANT RAILROAD COMPANY TO ASSENT AND AGREE, IN VIEW OF THE NON-ANTECEDENT EXAMINATION AND LACK OF DECISION OF THE QUALITY OF THE LAND, THAT THE EXCEPTED PATENT SHOULD ISSUE UNDER WHICH THE LEGAL TITLE OF MINERAL SUBDIVISIONS SHOULD REMAIN IN THE UNITED STATES, AND IT WAS COMPETENT FOR THE UNITED STATES TO ISSUE SUCH A PATENT UNDER SUCH AN AGREEMENT.

Counsel in the courts below contended that the grant was a "contract" between the United States and the defendant railroad and that under the contract the railroad company was entitled to a free and clear patent pursuant to the terms of the joint resolution of June 28, 1870, for each constructed and equipped section of twenty-five miles and, consequently, the agents of the government had not the right to include in the contract any exceptions whatsoever, all of which, if true, does not alter the fact that the railroad company was in no instance authorized to ask or to receive mineral lands under the "contract." Then again there is no restraint on the part of the United States to enter into any contract is sees fit to enter and we are willing to agree that the patent is a contract.

The law required and the defendant railroad knew that under the "contract" the quality of the land should be primarily determined by the land department before the patent should issue based on a judgment of the land department that the quality of the land had been determined to be non-mineral; and the defendant railroad company knew that the lands in controversy were mineral, that they were covered by valid, subsisting, recorded mining locations and, therefore, we urge that it was competent for the United States and the defendant railroad company should agree that the patent *or contract* that was about to issue should not include lands known to be mineral, or lands covered by prior valid, subsisting recorded locations or lands which had not been examined by the land department and determined not to be non-mineral in character.

Prior to that time the congress had forfeited the land grant of the defendant railroad company as to lands not earned under the grant and had directed the secretary of the interior to "adjust" the grant in accordance with the decisions of this court and in this instance the grant was "adjusted" pursuant to agreement that owing to the existing conditions the patent which the defendant railroad with full knowledge of physical conditions, had applied for, should contain an

exception of "all mineral lands," which included lands *known* to be mineral, lands held under prior mining locations and *unknown* mineral lands. The agreement was equitable and just; there was a *lieu limit twenty* miles in width and two hundred and fifty miles in length in which the defendant railroad had, and still has, the right to be compensated for lands known to be mineral, or covered by mining locations or land subsequently found to be mineral and the area thus open to such compensatory selection on part of the defendant railroad company aggregated approximately *six million acres* or an amount equal to the primary grant as under the construction of the grant by the land department the defendant railroad company was not limited to odd numbered sections in the lien limits and even if it was, the defendant railroad company would still have three million acres to make its lien selections from.

Take for instance the patent under consideration which called for 440,000 acres of land: the length of road constructed and to which the patent applied was *forty miles* which under the most favorable construction of 12,800 acres per mile, would entitle the railroad company to five hundred and twelve thousand acres of land, with the lieu limits adjacent to that forty mile construction that contained, subject to the call of the defendant railroad com-

pany, 483,000 acres of land! and which *is still subject to the call of the railroad company.*

The principle of the right of the United States to trade and deal in equity for its interests and the interests of its citizens is well exemplified in the dealings between the United States and the Santa Fe Railway System, under the forest reserve lieu right statutes.

That railroad company claimed under a grant from the congress about two million acres of land situate in Arizona and later the president by proclamation pursuant to congressional authority created a forest reserve, the boundaries of which embraced the railroad lands and thereupon the railroad company asserted the right to exchange, under the previous forest reserve lieu act, such lands for other lands of the public domain but the exchange was only completed by the making of an agreement to the effect that a portion of those exchange rights should only be exercised on a limited portion of the public domain while the forest lieu act made no restriction in that regard whatever, and later, and when the forest lieu act has repealed the legality of the Santa Fe, agreement was recognized by the congress.

It may be asked by the defendant if it be true as we contend why did not the acceptance of the excepted patent by the

patentee in the *Deffebach v. Hawke case* constitute an estoppel against the grantee or patentee in that instance?

The answering reasons are obvious as the record in that case discloses that the placer mining locator had duly complied with the law and the land department had antecedently determined that he was entitled to all the land applied for including the *entire surface* of the claim and consequently to *limit* the grant by taking away all or a portion of the surface of the land would be illegal and contrary to the provisions of the law in regard to the placer mining law and the patentee had no *lieu* rights which would afford him compensation elsewhere and finally there was *no* suggestion in the record of the case or in the opinion of the court or in the arguments of counsel that the illegal and unauthorized exception which limited the grant and which did not give expression to the intent of the predicating statute had been inserted pursuant to the assent and agreement of the parties: and the further answer is that the patent in this suit having issued pursuant to the assent of the parties the patent under the rule of property is to be construed in light of the rule of property prevalent in the state of California and in which state as stated Mr. Justice Fields when chief justice of the Supreme Court of that state (*Fremont v. Flower, supra*) is that a patent is

subject to the same rule of construction as applies to conveyances between individuals and counsel cannot contend as between individuals the agreed exception of mineral land in a deed would not be lawful and valid!

The Act of March 3d, 1849, vested complete jurisdiction over mines and public lands in the secretary of the interior and the various adjustment acts authorized him to adjust the railroad land grants which had been forfeited with *only* one restriction and that has no adjustment should be so construed as to *enlarge* the amount of lands to which any railroad grantee would be entitled to receive under any of the land grant and it must, we submit, be admitted that he was authorized to make any adjustment *that might even limit or reduce the quantity or quality of a grant but could not enlarge or enhance said grants!*

Counsel in the courts below contended that their forfeited grant was "adjusted" by the secretary of the interior pursuant to the "adjustment acts," and such contention may only lead to one true conclusion and that is the secretary of the interior within the limits of the decisions of this court was entitled to bargain with the defendant railroad company and independent of all other reasons *was* entitled to insert the *mineral exception in the grant!* as he *knew* the non-mineral quality of

the land had not been determined and that under no circumstances should mineral lands, except in the right of way, pass to the defendant railroad company.

Counsel contended that under the adjustment acts that any "adjustment" made was final and we so agreed if it gave expression to the intent of the statute and did not enlarge the quantity or quality of the grant.

But independent of any adjustment act we contend that the agreement entered into by the defendant railroad company and the United States was valid and is conclusive of this controversy and precludes the defendants from asserting that the legal title to the lands in controversy passed to it under the grant or patent or from now denying that the legal title not passing the lands were not open to the relocations on which this suit is based. We are aware of the decisions that hold that no illegal or unauthorized or nugatory provision may be inserted in any document by any public officer or that the acceptance of such a document does not bind the accepting party to a performance of the illegal or void conditions and prejudicing restriction.

The same rule applies to deeds and testamentary devises, to deeds of trusts, but has no application to a land grant patent containing an exception that only gives

expression to the predicating statutes and which under no circumstances may deprive the railroad company of that to which under the grant it was entitled to receive and which when said right is lost by statutory reasons may be compensated through the lieu *indemnity* lands—lands termed by the law as indemnity lands.

Without any mental reservation we admit the United States could not force on the railroad grantee a patent that would limit the grant and even if it refused to receive a limited patent it could, absolutely independent of a patent and of any arbitrary or illegal action on part of the secretary of the interior protect any possessory title it had through the action of the courts and we assume that this court will take judicial cognizance of the fact that the land grant railroads sold millions and millions of acres of land within their primary grants many years before the issuance of any patent!

We admit as a matter of course that if the insertion of the mineral exception took away by the patent what otherwise would have passed by the grant would render the mineral exception nugatory and void, but such is not the case here.

We admit as of course that even if the patent issued and the mineral exception was inserted therein pursuant to the assent and agreement of the defendant

railroad company that the same would be nugatory if it violated the canons of morality or the public faith, but of course no such condition exists and we now come down to the last contention of the defendant railroad in regard to the mineral exception, namely, that no consideration flowed to the patentee for the insertion of the mineral exception and therefore the defendant railroad may not be bound by the mineral exceptions!

To such extraordinary proposition we reply, in the first instance, that is difficult to conjecture just what "consideration" should have flowed to the defendant railroad for giving up and surrendering "mineral lands" which under no circumstances was it entitled to receive! And yet the grave pretension was made by counsel in the courts below that the mineral exception was void because the defendant railroad company received no consideration from the United States for the *"mineral exception."*

As a matter of law the defendant railroad company under no circumstances would be entitled to a consideration. It had built a railroad and as a gift the United States was giving it a grant of millions of acres of lands. To obviate some public criticism at the time the grant made some reference to the carrying of troops and munitions of war but the stub railroad of the defendant running from

Goshen Junction to Alcade and from San Jose to Tres Pinos would not be very available for the transportation of troops and munitions of war even at Spanish-American railroad war rates, for if any troops were dumped into the Coalinga desert they could only consume the munitions of war and then return to Goshen Junction and await some more munitions of war.

Counsel attempted in view of such provision to contend that the defendant railroad company for a construction of its railroad and in payment therefor the United States was to turn over to the railroad company the land designated in the grant!

We shall not consume any space in making reply thereto but will content ourselves with saying that if such be the fact the government was sadly cheated and that the treasury records will disclose that the defendant railroad company has been, to say the least and to speak mildly, well paid for its transportation of "mails, troops and munitions of war."

The grant did not contain one single element of a grant, it was a gift, a gift of an empire to a railroad and from which all the profit has flowed to the railroad company and now it urges it may retain mineral lands worth half a billion of dollars because it received "no consideration" for its agreement that it

should not receive what the law said it should not and could not receive!

Finally, it must be remembered that in inserting the mineral exception the department was acting on a construction of a statute which it was called on to construe and it followed a construction that was in force for at least *thirty-seven years* and even if the statute is ambiguous or doubtful in such regard the contemporaneous construction of the statute by the executive officers, coupled with the assent and acquiescence, whose duty it is to construe it, or those who have been called upon to carry it into effect, is entitled to great respect and should control the construction of the statute by the courts.

United States v. Moore, 95 U. S. 760;
U. S. v. B. & M. R. Co., 98 U. S. 336;
U. S. v. Graham, 110 U. S. 219;
Brown v U. S., 113 U. S. 568;
The Laura, 114 U. S. 413;
Sub. nom. Pollock v. Bridgeport, 29 L. Ed. 147, 5 Sup. Ct. Rep. 181;
U. S. v. Philbrick, 120 U. S. 52;
Robertson v. Downing, 127 U. S. 613;
Hastings etc. v. Whitney, 132 U. S. 365;
Heath v. Wallace, 138 U. S. 578;
Penmoyer v. McConnaughy, 140 U. S. 23;
Barden v. N. P. R. R. Co., 154 U. S. 288.

We close this brief and submit the question in controversy to this court with citing the following cases, all of which uphold the right of the United States to enter into agreements not contrary to good morals or public policy or the law and which cases in every instance uphold our contentions.

EDMUND BURKE,
Attorney in Pro. Per.

Owing to an error of the printer the matter following the last paragraph was omitted and is presented in a supplemental brief.

Appendix.

Exhibit "A."

In the Circuit Court of the United States in and for the Southern District of California, Northern Division.

Edmund Burke, complainant, v. The Southern Pacific Railroad Company, The Kern Trading and Oil Company *et al.*, defendants.

Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California:

Edmund Burke, a citizen and resident of the state of California, brings this his bill of complaint against the above-named defendants. And thereupon your orator complains and says:

1. That at all times hereinafter mentioned, the defendant, The Southern Pacific Railroad Company, was and is a corporation, created and existing pursuant to the laws of the state of California, and had and has its principal office at the city of San Francisco, in the state of California.

2. That The Kern Trading and Oil Company, for the last five years has been, and now is a corporation created and existing pursuant to the laws of the state of California, and has its principal office at the city of San Francisco, in the state of California, and always has been, and now is wholly owned, dominated, controlled and operated by The Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which, by law, the said The Southern Pacific Railroad Company is prohibited from doing, to-wit: Mining for petroleum and other minerals, and dealing with the same as a commodity, and claiming, for the benefit of The Southern Pacific Railroad Company, as an alleged lessee of the said Southern Pacific Railroad, the certain prohibited and interdicted min-

eral lands hereinafter referred to; the said The Kern Trading and Oil Company does the things and makes the illegal claims and demands hereinafter set forth, against the complainant, and the lands herein described, and all of which is to the prejudice and damage of this complainant, as hereinafter appears and is set forth.

3. That the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of all of sections 11, 13, 23, 33, township 19 south, range 15 east, M. D. B. & M., Fresno county, California, and all of section 5 in township 20 south, range 15 east, M. D. B. & M., Fresno county, California, as placer mining claims, under the mining laws of the United States, to the extent of one-tenth (1/10) undivided interest in each and all of the same.

4. That all of the above-described lands were known mineral lands and have been subject to location under the mining laws of the United States and under the local rules, customs and usages prevailing in the state of California, and the mining district in which said lands are situate, since the 1st day of January, 1865.

5. That all of the same, and each and every legal subdivision thereof now is and at all times has been mineral land of great value, containing minerals in commercial quantities, and all of which was known to the above-named defendant, The Southern Pacific Railroad Company, its agents, officers and servants, since prior to the 1st day of January, 1865.

6. That on July 27th, 1866, the congress of the United States passed a certain act making a grant of the public lands of the United States to the defendant, The Southern Pacific Railroad Company, and that section 3 of said Act of July 27th, 1866, is in the words and figures as follows, to-wit:

"Section 3. And be it further enacted, that there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific Coast, and to secure the safe and speedy transportation of mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, all under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company, upon the terms named in the 1st and 17th sections of this act; provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-num-

bered sections, nearest to the line of said railroad, and within twenty miles thereof, may be selected as above provided. And provided further, that the word 'mineral' when it occurs in this act, shall not be held to include iron and coal. And provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad."

7. And your orator further says that section 18 of said act is in the words and figures following, to-wit:

"Section 18. And be it further enacted, that The Southern Pacific Railroad Company, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have uniform gauge and rate of freight and of fare with said road; and in consideration thereof to aid in its construction shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

And that a construction and interpretation of sections 3 and 18 of said act, and of all acts and joint resolutions amendatory thereof, and supplemental thereto, covering and embracing the lands herein described, is involved in this suit and requires the construction of the court.

8. That thereafter, and by virtue of a joint resolution of congress, approved June 28th, 1870, certain conditions were expressly imposed and prescribed, by and under which said railroad and telegraph lines should be constructed, and under what terms and conditions and limitations,

patents should be issued by the secretary of the interior to defendant, The Southern Pacific Railroad Company, for said granted lands, and said joint resolution was, and is, in the words and figures as follows, to-wit:

"Be it resolved by the senate and the house of representatives of the United States of America in congress assembled, that The Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act, making a grant to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said Act of July 27th, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866."

9. That on July 10th, 1894, a patent purporting to convey certain lands, yet excepting and excluding the above described lands, issued from the United States to The Southern Pacific Rail-

road Company, and was accepted by the said The Southern Pacific Railroad Company, and recorded in the office of the recorder of the county of Fresno, in the state of California, on the .... day of ....., 1894, by said The Southern Pacific Railroad Company; that attached hereto is a copy of said alleged patent, marked exhibit "A," omitting only the description of other lands not involved herein, and which is hereby referred to and made a part of this bill.

10. That prior to the 9th day of July, 1892, all of the said lands mentioned and described herein were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws of the United States, and said several and divers mining locations were made by said divers citizens of the United States after a discovery of mineral on each of said mining claims embraced therein and at the time of the issuance of said alleged patent were not public lands subject to sale and disposal, or within the jurisdiction of the interior department of the United States and said lands were not the property of the United States, and not within the power of the United States to dispose of the same, but were segregated from the public domain, the beneficial title thereto being in said mining locators, and the legal title thereto being held in trust by the United States for said locators, or for their successors, heirs or assigns.

11. That all of said mining locations, prior to the issuance of said patent, and prior to the application of the said The Southern Pacific Railroad Company for patents, as hereinafter set forth, had been duly recorded in the office of the recorder of the mining district of Coalinga, in the county of Fresno, in the state of California, of all of which the said The Southern Pacific Railroad Company, its officers, agents and serv-

ants had due notice; that said Coalinga mining district had been organized theretofore in pursuance to law, and was the proper place for record of said mining locations, all of which the said The Southern Pacific Railroad Company had knowledge prior to the issuance of said alleged patent.

12. That notwithstanding said knowledge and notice, and notwithstanding that the said The Southern Pacific Railroad Company, its officers, agents and servants, well knew all the lands herein described were mineral lands, and lands on which there were valid subsisting mining locations of record as aforesaid, and that the said The Southern Pacific Railroad Company was not entitled to a grant of the same, and that the said lands were precluded from the operation of said grant, the said The Southern Pacific Railroad Company did falsely and corruptly cause one Jerome Madden, its then land agent, on or about the 9th day of May, 1892, to make, and he did make, the certain false, wicked, corrupt and fraudulent affidavit and application in manner following, that is to say:

"State of California, City and County of San Francisco.

I, Jerome Madden, being duly sworn, depose and say that I am the land agent of The Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said company, from a point in the northeast quarter of section 2, township 19 south, range 20 east, M. D. B. & M., to Alcalde, for which a grant of lands was made by the acts of congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated,

and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter section 2, township 19 south, range 20 east, M. D. B. & M., and ending at a point in the northeast quarter section 23, township 21 south, range 14 east, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th day of May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

13. That thereafter, and pursuant to said affidavit so made and aforesaid, for the purposes aforesaid, there was issued to The Southern Pacific Railroad Company the alleged patent hereinbefore referred to.

14. That on the ..... day of ....., 1894, the Honorable G. W. Lamoreaux, commissioner of the general land office, and Honorable Hoke Smith, secretary of the interior, approved said application, but therein it was expressly provided that there should be excluded from the approval, and from the transfer in the patent that was to issue:

"All mineral lands should any such be found in the tracts aforesaid, but the exception, according to the terms of the statute was not to be construed to include iron and coal."

15. And thereupon the said alleged patent issued as aforesaid.

16. Your orator further says and shows unto Your Honors that the defendant, The Southern

Pacific Railroad Company, did assent to all of the terms and conditions of said act of congress, approved July 27th, 1866, and the joint resolution of June 28th, 1870, and they did wholly submit to and accept the terms and conditions of said acts, and did agree that The Southern Pacific Railroad Company, and its assigns and successors and all persons then or now in privity with it, should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation did not convey to the said defendant, The Southern Pacific Railroad Company, the lands hereinbefore described, or any part thereof, and that said exception, exclusion and reservation was a term of description which was accepted by the said The Southern Pacific Railroad Company at the time of the issuance of said patent.

17. That the lands in controversy are not within the limits of twenty miles of the line of the railroad of said defendant, The Southern Pacific Railroad Company, and are not coterminus with any completed twenty-five mile section of the line of railroad of said The Southern Pacific Railroad Company, and that the railroad, to aid in the construction of which said grant of lands was made, has never been completed, and that all the lands herein described lie opposite to and coterminus with an uncompleted twenty-five mile section of said railroad; and in respect to this subject, your orator alleges that a construction by this court of sections 4 and 6 of the said Act of July 27th, 1866, is involved. Your orator alleges that said patent was issued without jurisdiction on the part of the land office

of the United States and in contravention of section 4 of said Act of July 27, 1866, and said lands were certified and approved by the secretary of the interior, and said alleged patent issued, wholly without authority of law and in contravention of section of the Act of March 3d, 1887, and a construction of which act last aforesaid is involved in this suit.

18. Further reiterating all the foregoing allegations, complainant alleges that said grant and patent did not convey said sections, or any part thereof, and said patent to the said The Southern Pacific Railroad Company was issued by the United States, and accepted by the said The Southern Pacific Railroad Company with said exception and reservation, expressly excepting, precluding and excluding all mineral lands that might at any time be found therein, and that the said The Southern Pacific Railroad Company accepted the same with such exception and reservation. And your orator further alleges that at the time of the making of said grant, and the issuance of said patent, and prior thereto, and ever since, said lands and sections and each legal subdivision thereof, were mineral and not agricultural in their character, and that the same was a fact at all of said times of common and current observation, and known to the said The Southern Pacific Railroad Company at all the times herein mentioned, and that, as your orator is informed and believes, and therefore avers, prior to the issuance of said alleged patent, the said lands have been examined by the department of the interior, through its geological department, in manner and form of law, and determined to be mineral lands, and not agricultural in their character, and more valuable for mining than for agricultural purposes.

19. That prior to the 10th day of July, 1894, and subsequent to the 1st day of November,

1891, and on or about the 22d day of May, 1892, the said The Southern Pacific Railroad Company made the application for patents herein referred to, to the secretary of the interior, for said sections of land under said congressional act, as alleged in the said petition therefor, and for all of the said sections of the public land as therein set forth, and on July 10th, 1894, the said The Southern Pacific Railroad Company received and accepted from the United States, and caused to be recorded in the office of the recorder in the county of Fresno, the certain patent as hereinbefore stated, and the said The Southern Pacific Railroad Company under said patent does now assert ownership in fee to each and every legal subdivision thereof, but has never been at any time, or now is in the actual, open, peaceable, notorious, public, and physical possession of any part of the same, and neither at the time of the commencement of this action, nor at any other time were any of the defendants in the actual, open, peaceable, notorious, public and physical possession of the same, or any part of the same, but at all times, since the making of said grant of July 27th, 1866, the said lands have been wild, open, unoccupied, unappropriated lands, free from any physical sign of any claim of domination or ownership by any of the defendants herein.

20. And your orator further alleges that at no time did the locators of said mining lands, who made mining locations on the same prior to the 10th day of July, 1894, receive notes of the said application of the said The Southern Pacific Railroad Company for said patent, and there was no notice of hearing in the land office, and no opportunity was given to the said locators or any of them, to contest the application of the said The Southern Pacific Railroad Company for a patent to said land as aforesaid, and there was

no hearing in the land office, or in the department of the interior, to determine the mineral or agricultural character of any of the legal subdivisions of the land herein described, and that the said patent issued without any such determination, and said patent expressly reserving the determination of the quality of said lands for the subsequent consideration of a court of equity having jurisdiction over the subject matter of the same. And the said patent issued while the said mining locations and claims were in full force and effect and constituting a segregation, exception and reservation of the lands herein described and so located and claimed as aforesaid, and at a time when the locators and claimants were the possessory owners of the same, and all of said lands, and each and every part of the same, were at said time within six miles of divers other mining locations, made pursuant to the mining laws of the United States, all of which facts were then well known to the officers, servants and agents of said The Southern Pacific Railroad Company, and especially to the land agent of the said The Southern Pacific Railroad Company, and to its said land agent, that said sections of the public land herein described were not agricultural in character, or more valuable for agricultural than for mining purposes, or that they were of the character contemplated by the said grant to be passed to the said The Southern Pacific Railroad Company, and that all of the same were subject to and covered by valid subsisting mining locations, made by divers qualified locators under the mining laws of the United States and were within six miles of divers other mining locations on public lands, all of which facts were then knowingly, falsely, fraudulently and corruptly withheld by the said The Southern Pacific Railroad Company, its officers, agents and servants, from the

knowledge of the officers of the land department of the United States, for the purpose of deceiving the officers of the land department of the United States in relation to the mineral and non-agricultural character of said lands, and of the valid and subsisting mining locations thereon as aforesaid. And by reason of the said false, fraudulent and corrupt representations by said persons, and in the manner aforesaid, that said applied for sections of the said land were non-mineral, and agricultural in their character, and that there were no mining locations within six miles of any of said lands, or upon any of the said lands, said patent was issued by the officers of the land department of the United States, in ignorance of the facts, said officers having been deceived by said false and fraudulent representations of the said The Southern Pacific Railroad Company as aforesaid, that said sections were mineral, non-agricultural in their character, and of the character contemplated by the grant, as passing to said The Southern Pacific Railroad Company, and more valuable for mining than for agricultural purposes, and were covered by valid and subsisting mining locations, made pursuant to the mining laws of the United States prior to the time of said *ex parte* application of the said The Southern Pacific Railroad Company for a patent thereto, or were within six miles of other valid and subsisting mining locations made on the public lands of the United States pursuant to the mining laws of the United States, and that at the time of the making of such application for said patent as aforesaid, each quarter section of all of the said sections were, to the knowledge of the said The Southern Pacific Railroad Company, covered by valid subsisting mining locations, made pursuant to the mining laws of the United States, by divers of the above-

named defendants who received no actual or constructive notice of the said false and surreptitious application of the said The Southern Pacific Railroad Company for said patents to said lands, and there was at no time any hearing in the department of the interior to determine the mineral or agricultural character of said lands in said sections, of which said locators of the same, or their successor in interest or privies, or assigns or heirs, or representatives, had any actual or constructive notice or knowledge.

21. Reiterating all the foregoing allegations, complainant alleges that the said The Southern Pacific Railroad Company now claims the fee to said sections by reason of the issuance to it of said patent under said grant, which in fact did not convey the said sections to the said defendant railroad company, but which in express terms of description conveyed only such alternate odd-numbered sections of the public land not mineral, except as to coal and iron, to the amount of ten alternate sections per mile on each side of said railroad on the line thereof nearest to the line of said road and within twenty miles thereof, to be built, maintained and operated by said defendant railroad company between the city of San Francisco and the point of connection with the Atlantic and Pacific Railroad Company near the eastern boundary line of the state of California, which were not sold, reserved, or otherwise disposed of, or to which mining claims had not attached, and yet excluding and excepting all mineral lands, should any such be found in said lands so described in said patent. And which said sections so named as aforesaid were at such time located and claimed mineral lands, and reserved by law from sale or disposal as aforesaid. And this complainant alleges that said patent is null and void, insofar as the claim of title to said sections, or any part thereof,

under said patent is asserted by the said The Southern Pacific Railroad Company, or by The Kern Trading and Oil Company, but that said sections above referred to were reserved, excepted and precluded from the operation of said grant and patent, and that, upon the dates in March, 1909, as hereinafter appears, the said sections were mineral lands of the United States, open to exploration, location, purchase and sale, and that at said time said lands, after examination by the department of the interior had been determined and adjudged as mineral lands, bearing mineral in commercial quantities; that said sections are mineral lands, and have, since July 25th, 1866, been more valuable for mining than for agricultural purposes, and were, previous to March, 1909, formally designated by the department of the interior, after complete and thorough geological examination, to be lands bearing petroleum in commercial quantities.

22. That on the 2d day of March, 1909, all of sections 5, 11, 13, 23, and 33 as above described, were open to location under the mining laws of the United States, the said locators who had made prior locations thereon, having failed to perform, or commence the performance of their annual labor on each or any of the quarter sections thereof for the year 1908, and had not performed the same thereon up to the 3d day of March, 1909, when your complainant, together with the defendants, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, B. McGowan, E. M. Dunweedie, entered on said lands and made mining locations on each quarter section thereof, acting as an association of eight persons, pursuant to the mining laws of the United States, and thereby succeeded to all the right, title and interest in and to the quarter section of said section, of the prior mining locators of the discoveries on which said

proper mining locations were predicated, and all of said locations, or duplicates thereof, were duly filed in the office of the recorder of the county of Fresno, in the state of California, on the 6th day of March, 1909.

23. That contemporaneous with the making of said relocations there was a discovery of mineral on each of said locations by said relocators, and prior thereto said land had been properly and legally designated by the department of the interior, as lands bearing mineral in commercial quantities, and more valuable for mining than for agricultural purposes.

24. That the said defendants, in addition to the foregoing, claim to have some right, title or interest, in or to said sections, or to some portion thereof, adverse to complainant, but all of the claims of the said defendants, and each of them, are legally invalid, and said defendants have not, either jointly or severally, any legal right, title or interest in and to said section or any part thereof, or in or to any part of the said mining claims now subsisting on the said sections hereinbefore described.

25. That said patent constitutes a cloud on the title of your complainant in and to the above described land.

26. That the reasonable and market value of each of the said mining claims is upwards of sixty thousand dollars, and that the reasonable and market value of the undivided interest of your orator in each of said mining claims is upwards of six thousand dollars.

27. That irrespective of, and independent of the lands and mining claims described herein, the said The Southern Pacific Railroad Company has elsewhere received from the United States, under said congressional grant of July 27th, 1866, more land than it earned thereunder or was entitled to

receive thereunder, along and coterminus with the line of its railroad as partially constructed between San Jose, California, to Tres Pinos, California, and from Alcalde, California, to Mojave, California, a distance comprising two hundred and fifty-two and four hundred and seventy-nine thousands of a mile and thereby the lands herein described were not within the jurisdiction of the general land office at the date of said patent, the said exhibit "A" to convey to said The Southern Railroad Company, and were precluded from passing thereby or thereunder.

Wherefore, your orator prays that a construction and interpretation be had by this court of sections 3 and 18 of said act of congress, approved July 27th, 1866, and the joint resolution of congress authorizing, instructing and requiring the secretary of the interior of the United States to issue patents to The Southern Pacific Railroad Company, expressly prescribing what said patent should and should not contain, approved June 28th, 1870, and a final order and decree that patent issue, together with the reservation and exception therein contained.

2. That the defendants and each of them be estopped from claiming any right, title, interest or estate in or to any of the lands involved in this suit.

3. That an interlocutory injunction issue by this court against each and all of the defendants herein, and all the persons in privity with them, requiring each and all of them to desist from any interference with the property in dispute, claimed herein by your orator, or the minerals therein under the final determination of this suit, and that at that time said injunction be made perpetual.

4. That the complainant have such other and further order and relief as may be equitable and just.

5. That a writ of subpoena of the United States issue, directed to the defendants herein, commanding them on a certain day, and under a certain penalty, to be and appear in this court, and there to answer, without oath, the premises, and to stand by and abide such decree and order as may issue against them.

And further your orator sayeth not.

EDMUND BURKE,
In Pro. Per.

State of California, County of Los Angeles.

Edmund Burke, being duly sworn, deposes and says that he is the complainant above named; that he has read the foregoing bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes them to be true.

EDMUND BURKE.

Subscribed and sworn to before me, this 26th day of September, 1910.

J. S. MCKNIGHT,
Notary Public in and for the County of Los Angeles, State of Cal.

EXHIBIT "A" (TO AMENDED BILL).

PATENT.

To All to Whom These Presents Shall Come, Greeting:

Whereas by the act of congress approved July 27th, 1866, and joint resolution of June 28th, 1870, "to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast," and to secure to the government the use of the same for postal, military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the state, to construct a railroad and telegraph

line, under certain conditions and stipulations expressed in said act, from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said state, and provision is made for granting to the said company, "every alternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road" "not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

And whereas, official statements from the secretary of the interior, have been filed in the general land office, showing that the commissioners appointed by the president under the provisions of the fourth section of the said act of July 27, 1866, have reported to him, that the line of said railroad and telegraph from San Jose to Tres Pinos and from Alcalde to Mojave, together comprising two hundred and fifty-two miles and four hundred and seventy-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said act of July 27, 1866, and accepted by the president.

And whereas the following tracts have been duly listed under the act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

And whereas the said tracts of lands lie coterminus to the constructed line of said road and are particularly described as follows, to-wit:

South of base line and east of Mt. Diablo Meridian, state of California.

Township nineteen, range fifteen.

All of section 33 containing 640 acres.
(With other land.)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres.

Now, know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of congress, have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All mineral lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, shall not be constructed to include "coal and iron lands."

To have and to hold the same with the appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

In testimony whereof, I, Grover Cleveland, president of the United States, have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington, this the tenth day of July in the year of our Lord one thousand eight hundred and ninety-four and the independence of the United States, the one hundred and nineteenth.

By the President: GROVER CLEVELAND,
(Seal) M. KcKEAN,
Secretary.

L. Q. LAMAR,
Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive. Patent No. 22. Recorded Feb. 16, 1895, at 8.27 o'clock a. m. in Vol. P. of Patents, page 288 *et seq.*, Fresno county records.

(Endorsed): In equity, No. 192, United States Circuit Court, Southern District of California, Northern Division. Edmund Burke *et al.*, complainant, vs. The Southern Pacific Railroad Company *et al.*, defendants. Amended bill. Original. Filed Oct. 31, 1910. Wm. M. Van Dyke, clerk; Chas. N. Williams, deputy. Edmund Burke, *in pro. per.*, 616-17 Central Bldg., Los Angeles, California.

EXHIBIT "B."

(JOINT AND SEVERAL DEMURRER OF S. P. R. R. Co. *et al.* TO AMENDED BILL.)

Case No. 192.

United States Circuit Court, Ninth Circuit, Northern Division of the Southern District of California.

IN EQUITY.

Edmund Burke, complainant, vs. Southern Pacific Railroad Company *et al.*, defendants.

The joint and several demurrer of the defendants Southern Pacific Railroad Company and Kern Trading and Oil Company, to complainant's amended bill of complaint herein.

These defendants, Southern Pacific Railroad Company and Kern Trading and Oil Company, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto and to the whole thereof and for cause of demurrer show:

1st. That the said amended bill of complaint does not state a cause of action, or cause of suit, against these defendants, or any of them, within the jurisdiction of this court.

2nd. That the said amended bill of complaint

does not set forth or show any matter, equity, or cause, entitling complainant to file or maintain the same against these defendants, or any of them.

3rd. That the said amended bill of complaint does not set forth or show any matter, equity, or cause, entitling complainant to the discovery thereby sought, requiring or prayed, or to any discovery whatsoever, of or from these defendants, or any of them.

4th. That the said amended bill of complaint does not set forth or show any matter, equity, or cause, entitling complainant to the relief thereby sought or prayed, or to any relief whatsoever, of or from these defendants, or any of them.

5th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown thereby, is barred by the first section of the act of congress, approved March 2d, 1896, entitled "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," printed and published in volume 29, on pages 42 and following, United States Statutes at Large.

6th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended bill of complaint is barred by:

(a) The provisions of section 318 of the Code of Civil Procedure of the state of California.

(b) The provisions of section 319 of the Code of Civil Procedure of the state of California.

(c) The provisions of section 320 of the Code of Civil Procedure of the state of California.

(d) The provisions of section 321 of the Code of Civil Procedure of the state of California.

(e) The provisions of section 338 of the Code of Civil Procedure of the state of California.

(f) The provisions of section 343 of the Code of Civil Procedure of the state of California.

7th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended bill of complaint is barred by the long delay and laches of the complainant.

Wherefore, these defendants, jointly and severally, pray the judgment of this Honorable Court whether they, or any of them, shall make any further or other answer to the said amended bill of complaint, or to any part thereof, or to any matters or things therein set forth; and further pray to be hence dismissed, with their costs in this behalf sustained.

GUY V. SHOUP and
D. V. COWDEN,
Attorneys for the Defendants.

WM. SINGER, JR.,
Counsel for the said Defendants.

State of California, City and County of San Francisco,—ss.

G. L. King makes solemn oath and says: That he is the secretary of the Southern Pacific Railroad Company, named as one of the defendants in and to the foregoing joint and several demurrer; and that the said demurrer is not interposed for delay.

G. L. KING.

Subscribed and sworn to before me on November 9th, 1910.

(Seal) E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that, in my opinion, the foregoing joint and several demurrer is well taken in point of law.

WM. SINGER, JR.,
Counsel for said Defendants.

(Endorsed): No. 192. U. S. Circuit Court, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Co. et al. Joint and several demurrer of S. P. R. R. Co. and Kern Trading & Oil Co. to complainant's amended bill. Filed Nov. 11, 1910. Wm. M. Van Shoup and D. V. Cowden, attorney for defendants. Room 842, Flood Building, San Francisco.

EXHIBIT "C."

(Opinion in Roberts *et al.* v. S. P. Co. *et al.*)

In the United States Circuit Court in and for the Southern District of California, Northern Division.

George D. Roberts *et al.*, plaintiffs, v. Southern Pacific Company *et al.*, defendants.

Stripped of the mass of irrelevant and redundant matters contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land.'"

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until fifteen years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which tim they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they

ask the court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above-quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, fifteen years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents had turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by congress, notwithstanding the fact that the officers of the government, charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it cannot be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other

fraud on its part, the government, or anyone in privity with the government, could justly complain and by suit, brought within the time fixed by congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the government nor any one in privity with the government title, is here complaining. The suit is by strangers to that title, but by the express averments of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery by mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

"Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

Where did the officers of the government, charged with the duty of issuing patents for lands granted by congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which congress devolved upon the land department of the government as a pre-requisite to the issuance of a patent therefor? The statutes of the United

States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of congress of June 28, 1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Missouri, along a generally described route to the Colorado river, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean, granting to such company by the third section of the act:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office."

The 18th section of the act made a grant to the Southern Pacific Railroad Company, and is as follows:

"And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with

said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the act it was provided that whenever the railroad company "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the secretary of the interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, conforming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing act of congress, the Southern Pacific Railroad Company was a corporation of the state of California, and by its charter was authorized to build a railroad "from some point on the bay of San Francisco, in the

state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the eastern line of said state of California, there to connect with a contemplated railroad from said eastern line of the state of California to the Mississippi river."

The act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad "at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3d day of January, 1867, filed with the commissioner of the general land office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then secretary of the interior directed the commissioner of the general land office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles on each side of the road, as shown on the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following, the latter order was suspended, so far as it related to lands south of San Jose, California, and November 2 and 11, 1869, the then secretary of the interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days' notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended.

(Opinions of Attorney General, Vol. 16, pp. 80-89.) July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by congress (15 Stats. 187), and on June 28, 1870, congress passed the joint resolution in question, which is here set out in full:

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the court to "account for, explain, construe, in-

terpret and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the senate upon the resolution, where it was first introduced (congressional record, part V, 2nd session, 41 congress 1869-1870, pp. 3950, 3951, 3952, 3953).

While asking the court to account for and explain the clause, counsel at the same time assert that the court is not at liberty to refer to the debate in the senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by congress, but counsel are mistaken in supposing and asserting it to be improper for the court to refer to the debate. In Binnis vs. United States, 194 U. S. 486,495, the Supreme Court said:

"While it is generally true that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, United States vs. Freight Association, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determinating the scope of statutes passed on the strength of such reports. Holy Trinity Church vs. United States, 143, U. S. 457, 464. When sections 461 and 462 were under consideration in the senate the chairman of the committee on territories, in response to inquiries from senators, made these replies:

" 'The committee on territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no tax-

ation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the committee on territories, after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.' Vol. 32, congressional record, part LLL, page 2235."

In Jennison vs. Kirk, 98 U. S. 453, 459, the same court, in construing an act of congress and in referring to and setting forth certain statements of one of the senators made in the senate, said:

"These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of congress in the passage of the act."

In the case of People vs. Stephens, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the state, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See, also, Wadsworth vs. Boysen, 148 Fed. 771, 778; Ho Ah Kow vs. Nunan, Fed. Case No. 6546.

Turning to the debate in the senate upon the saving clause added to the joint resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located

upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the general land office on the 3d of January, 1867. By the joint resolution congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of the act of July 27, 1866, on each side of the line of road therein authorized; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all actual settlers thereon, congress provided in and by the joint resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the joint resolution being, as has been seen: "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or right at the time the line of the road should be designated by a plat thereof filed in the office of the commissioner of the general land office. Such are the express provisions of

the grant of July 27, 1866, expressly referred to in joint resolution for the conditions and restrictions of the grant of the lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the joint resolution, in my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the joint resolution of June 28, 1870, congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the commissioner of the general land office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have congress providing for the issuance of government patents for lands under

its grant which upon their face would leave open for all time, to be decided by courts or juries, as the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the commissioner of the general land office. As a matter of course, congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by congress and was designed, as the statute expressly declares, to convey the government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this court said in the case of Doe v. Waterloo Mining Co., 54 Fed. 935, 940:

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly

marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims? All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of Barden vs. Northern Pacific Railroad Co., 154 U. S. 288:

"The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action (as held in Deseret Salt Company vs. Tarpey, 142 U. S. 241), its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its de-

termination, that no mineral lands exist therein."

The observation that "the government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent" is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The court could not have so decided in that case, for there was no such question before the court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom on the ground that when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the government patent therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of non-mineral land only. But the court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the

character of the land rested upon the officers of the land department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the government patent.

The court said: "The law places under the supervision of the interior department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon

ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In Smelting Co. vs. Kemp, 104 U. S. 636, 640, 641, this court thus spoke of the land department in the transfer of public lands: 'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but in the nature of an official declaration by that branch of the government to which the

alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In Steel vs. Smelting Co., 106 U. S. 447, 450, the language of the court was that: 'The land department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In Heath vs. Wallace, 138 U. S. 573, 585, it was held that 'the question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact properly determinable by the land department.' And Mr. Justice Lamar added: 'It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.' If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting

lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the secretary of the interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in Knight vs. Land Association, 142 U. S. 161, 178, as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the land department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of the Central Pacific Railroad Company vs. Valentine, 11 Land Dec. 238, 246, the late secretary of the interior, Mr. Noble, speaks of the practice of the land department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office

of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction, is in the land department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many past years to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them.

The fact remains that under the law the duty of determining the character of the lands granted by congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the Barden case any support for the contention of the complainants' counsel that the officers of the land department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and exempting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the Barden case is, I think, shown by its reference thereto in the case of Shaw vs. Kellogg, 170 U. S. 313, where, at page 339, it says:

"Defendant relies largely on the decision of this court in Barden vs. Northern Pacific Railroad, 154 U. S. 288, in which it was held that

lands identified by the filing of the map of definite location as within the scope of the grant made by congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—Shaw vs. Kellogg—is direct authority for the proposition that the officers of the land department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in Shaw vs. Kellogg was made by section 6 of an act of congress passed June 21, 1860 (12 Stats. 71), in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-

mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected. The grantees made their selection and applied for the land. Certain correspondence occurred between the land department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the land department instructing the surveyor general to approve the selection and make a survey thereof. The land department subsequently approved the survey, field notes and plat of the surveyor general, but in doing so added the words "subject to the conditions and provisions of section 6 of the act of congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The act of congress did not provide for the issuance of a patent, but the land department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

"These contentions are that congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the government; that the land department never adjudicated that this was non-mineral land, but on the contrary simply approved

the location, subject to the conditions and provisions of the act of congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the land department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field-notes and plat thereof, the Supreme Court said:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of congress in respect to homestead, pre-emption

and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the land department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in Deffeback vs. Hawke, *supra*, 406:

" 'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.' "

It results from what has been said that the demurrers must be, and are, sustained and the bills dismissed at the complainant's cost.

Ross,
Circuit Judge.

(Opinion.)

In the United States Circuit Court in and for the Southern District of California, Northern Division.

Edmund Burke, complainant, vs. Southern Pacific Railroad Company, *et al.*, defendants.

The views expressed in the opinion delivered in the case of Roberts *et al.* vs. Southern Pacific Railroad Company, just decided, applied to this case, makes necessary the sustaining of the demurrers to the bill and cross-bill and their dis-

missal at the cost of the respective complainants. An order to that effect will be entered.

(Endorsed): No. 192. In the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Company *et al.* Opinion. Filed Mar. 13, 1911. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

EXHIBIT "D."

DEED No. 11692.

This deed, made February 15th, 1900, between the Southern Pacific Railroad Company, a corporation, D. O. Mills and Homer S. King, trustees under the trust deed hereinafter set forth, the parties of the first part, and John A. Bunting, the party of the second part, witnesseth: That

Whereas, on April 1st, 1875, the said Southern Pacific Railroad Company, by trust deed bearing that date, conveyed to D. O. Mills and Lloyd Tevis, their successors and assigns, all lands granted by the United States to aid in the construction of the said company's railroads in trust to secure payment of certain bonds particularly set forth in the said trust deed; of which the lands hereinafter described are a part; and

Whereas, the said trust deed provided that the said company may sell the lands in it conveyed as opportunity occurred, upon terms agreed upon by the said company and trustees; and that when a tract or parcel of said lands shall have been sold and the purchase price fully paid, it shall be conveyed in fee simple by the said company and trustees, to the purchaser thereof; and that such conveyance shall release the land so conveyed from all lien or incumbrance of the said trust deed, absolutely and forever; and

Whereas, the said trust deed further provided

that in case a vacancy should occur in the number of said trustees, such vacancy should be filled by the nomination of the remaining trustees, subject to the approval of the board of directors of the said company; and that the person so nominated and approved should immediately upon his acceptance of such appointment, become a trustee under such trust deed, vested with the same estates, powers, rights and interests and charged with the same duties and responsibilities, as if he had been one of the original trustees named in and who executed the said trust deed; and

Whereas, on March 24th, 1883, Lloyd Tevis, one of the trustees aforesaid, resigned his trust under the said trust deed; and on April 3, 1883, the said D. O. Mills, as remaining trustee, nominated Gerrit L. Lansing to fill the vacancy created by the resignation of the said Lloyd Tevis; and on April 17th, 1883, the board of directors of the said company approved the nomination of the said Gerrit L. Lansing and on April 18th, 1883, the said Gerrit L. Lansing duly accepted the said appointment; and

Whereas, on February 4th, 1896, the said Gerrit L. Lansing died; and on March 14th, 1896, the said D. O. Mills, as remaining trustee, nominated Homer S. King to fill the vacancy created by the death of the said Gerrit L. Lansing; and on March 18th, 1896, the board of directors of the said company approved the nomination of the said Homer S. King; and on March 21st, 1896, the said Homer S. King duly accepted the said appointment; and

Whereas, the said trust deed further provided that the trustees under it shall have the power and authority to act by attorney, to be appointed by them, in making the conveyances in said trust deed provided for; such appointment to be made by letter of attorney, duly acknowledged, and to

be recorded in each county within which any of the lands of the said trust deed are situated; and that all deeds made in the names of said trustees, by their attorney appointed as aforesaid, shall have the same force and effect as if made by the said trustees in person; and

Whereas, on March 28th, 1896, the said D. O. Mills and Homer S. King, trustees as aforesaid, by letter of attorney duly acknowledged and recorded as in the said trust deed provided, appointed Jerome Madden, their true and lawful attorney, in their names, place and stead, to make, execute and deliver all conveyances required of them under and pursuant to the terms of the said trust deed; and

Whereas, the said company contracted to sell the hereinafter described lands on terms agreed upon by it and the said trustees to John A. Bunting for the sum of sixteen hundred and thirty-four 52-100 ($1634.52) dollars, which sum has been fully paid to the said D. O. Mills and Homer S. King, trustee, as aforesaid.

Now, therefore, in consideration of the premises, and the said sum of sixteen hundred and thity-four 52-100 ($1634.52) dollars, the receipt whereof is hereby acknowledged, the parties of the first part do grant and convey to the said party of the second part, and to his heirs and assigns, the following described tract of land situate, lying and being in the county of Kern, and state of California, to-wit: All of fractional section No. thirty-one (31), in township twenty-eight (28) south, of range twenty-eight (28) east, Mount Diablo base and meridian, containing six hundred and fifty-three 81-100 (653 81-100) acres, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging, excepting and reserving all liability on the part of the Southern Pacific Railroad Company, for taxes and assess-

ments thereon since August 1st, 1899, the said purchaser having heretofore agreed with said company to *pay the same, and also reserving all claim of the United States to said tract as mineral lands.*

To have and to hold the aforesaid premises, to the said party of the second part, his heirs and assigns, to his and their use and behoof forever.

In testimony whereof, the said Southern Pacific Railroad Company has caused its name to be signed to these presents by its president *pro tem* and secretary, and its corporate seal to be hereunto affixed; and the said D. O. Mills and Homer S. King, trustees, by their said attorney, Jerome Madden, have hereunto subscribed their names and affixed their seals the date herein first written.

SOUTHERN PACIFIC RAILROAD COMPANY,
(Seal) By H. E. HUNTINGTON,
Its President (Pro Tem.)
By J. L. WILLCUT,
Its Secretary.
D. O. MILLS, (Seal)
HOMER S. KING, (Seal)
Trustees.
By JEROME MADDEN,
Their Joint Attorney-in-Fact.

State of California, City and County of San Francisco—ss.

On this 16th day of February, in the year one thousand nine hundred (1900), before me, E. B. Ryan, a notary public in and for said city and county of San Francisco, state of California, personally appeared H. E. Huntington, known to me to be president *(pro tem.)*, and J. L. Willcut, known to me to be the secretary of the corporation that executed the within instrument; and each of them acknowledged to me that such corporation executed the same; also, on this the day aforesaid, before me, the notary public aforesaid, personally appeared Jerome Madden, known to

me to be the person whose name is subscribed to the within instrument, as the attorney-in-fact of D. O. Mills and Homer S. King, and acknowledged to me that he subscribed the names of the said D. O. Mills and Homer S. King thereto as principals, and his own as attorney-in-fact.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, state of California, on the day and year above written.

(Seal) E. B. RYAN,

Notary Public in and for the City and County of San Francisco and State of California.

I certify the foregoing to be a true copy of the original filed for record at the request of the Kern County Abstract Company, February 17th, 1900, at 8:50 a. m.

CHAS. A. LEE, *Recorder.*

By C. S. MERONEY, *Deputy.*

State of California, County of Kern—ss.

I, Chas. A. Lee, county recorder of said county, do hereby certify that the annexed is a whole, true and correct copy of an original, as will appear by reference to book 98 of deeds, page 10, now in my office, and that said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and official seal this 25th day of November, A. D. 1910.

(Seal) CHAS. A. LEE,

Recorder in and for the County of Kern, California.

Exhibit "E."

Memorandum in Relation to the Southern Pacific Land Locations at Coalinga Under the Jerome Madden Application for Patent.

1. Madden was appointed land agent of the railroad company by a resolution of its board of directors on the 10th day of May, 1876.

2. Prior to the 14th day of May, 1892, Madden as such land agent filed in the Visalia land office an application for the granted lands running to the railroad company for a construction of the 9th and 17th sections of said road commencing at a point N. E. quarter S. 2, T. 19 S., R. 20 E., M. D. B. & M., and ending at Alcalde.

3. On the 9th day of May, 1892, Madden made the following affidavit:

"State of California, City and County of San Francisco.

I, Jerome Madden, being duly sworn, deposes and say: That I am the land agent of the Southern Pacific Railroad Company, that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the Southern Pacific Railroad Company in inuring to it, to aid in the construction of the railroad of said company from a point in N. E. ¼ Sec. 2, T. 19 S., R. 20 E., M. D. B. & M. to Alcalde, for which a grant of land was made by the acts of congress approved July 27th, 1866, July 25th, 1868, and June 28th, 1870, as aforesaid, and that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character comtemplated by the grant, being within the limits of twenty (20) miles on each side of the land of route for a continuous distance of forty 559-1000 (40 559-1000) miles,

being for the ninth (9th) and seventeenth (17th) sections of said road, starting from a point in N. E. ¼ Sec. 2, T. 19 S., R. 20 east, M. D. B. & M., and ending at a point in N. E. ¼ Sec. 23, T. 21 S., R. 14 E., M. D. B. & M.

(Seal) JEROME MADDEN.

Sworn to and subscribed before me this ninth (9th) day of May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

4. Thereupon the register and receiver made the following certificate:

"United States Land Office,

Visalia, Cal., May 14, 1892.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Southern Pacific Railroad Company, by acts of congress, aproved July 29th, 1866, July 25th, 1868, and June 28th, 1870, above mentioned, and selected by Jerome Madden, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of twenty (20) miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state, or other valid claims to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of congress, approved July 1st, 1864, and contemplated by the circular of instructions dated January 24th, 1867, addressed by the

commissioner of the general land office to registers and receivers of the United States land office, and that the said company have paid the undersigned, the receiver, the full sum of forty-two hundred and fifty-eight ($4258.00) dollars in full payment and discharge of said fees.

M. J. WRIGHT, *Register.*
R. L. FREEMAN, *Receiver.*"

5. That on May 16th, 1894, the department of the interior made list No. 19 of Southern Pacific lands, main line, granted limits, Los Angeles, Independence, San Francisco and Visalia districts, California, which is a duplicate of list No. 34 filed by Madden and reading as follows:

"Department of the Interior,
General Land Office,
May 16th, 1894.

Whereas, by the act of congress approved July 27th, 1866, and joint resolution of June 28th. 1870, to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast and to secure to the government the use of the same for postal, military or other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the state, to construct a railroad and telegraph line under certain conditions and stipulations expressed in said act, from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad, near the boundary line of said state, and provision is made for granting to the said company every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road "not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption

or homestead claim may not have attached at the time the line of said road was definitely fixed.

And whereas, official statements from the secretary of the interior have been filed in the general land office, showing that the commissioner appointed by the president, under the provisions of the fourth section of said act of July 27th, 1866, and have reported to him that the line of said railroad and telegraph, from San Jose to Tres Pinos, and from Alcalde to Mojave, together comprising two hundred and fifty-two miles and four hundred and seventy-nine thousands of the mile, has been constructed and fully completed and equipped in the manner prescribed by said act of July 27th, 1866, and accepted by the president.

And whereas, the following tracts have been duly listed under the act aforesaid, by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

And whereas, the said tracts of land lie coterminous to the constructed line of said road and are particularly described as follows, to-wit:" (Here follows description.)

6. That on the 16th day of May the following certificates were made.

"General Land Office,
Railroad Division,
May 16, 1894.

We hereby certify that the foregoing list has been carefully examined in connection with the records and plats of this office and the tracts therein described are found to be vacant and unappropriated and within the primary limits of the grant of July 27th, 1866, to the Southern Pacific Railroad Company (main line) and subject to ap-

proval and patent to said railroad company under said act.

M. B. HARVEY,
M. NIVEN,
Examiners.

Approved:
Chief of Division."

"General Land Office,
Mineral Division,
June 23, 1894.

This certifies that the tracts described in the foregoing clear list No. 19 have been examined in connection with the records of this office and are not to be in conflict with mining claims and were not returned as mineral by the United States surveyor-general. There are no mining claims of record for lands in the townships containing selections or within six miles of such selections.

GEO. F. POLLOCK,
C. A. HOLLINGSWORTH,
Examiners.

Approved:
J. WRIGHT,
Chief of Division."

6. That on June 23rd the following certificate was made:

"General Land Office,
Division of Swamp Lands,
Washington, D. C., June 23, 1894.

This certifies that the foregoing list No. 19, Southern Pacific railroad, aggregating 440,900.85 acres, has been carefully examined in connection with the swamp land records of this office,

and that the same has been found free from conflict.

G. T. PIERCE,
Examiner.

Approved:
EDMOND MALLET,
Chief of Division."

7. Thereafter and on June 27th, 1894, the commission of the general land office made the following oratory in connection with the application:

Now, therefore, as it has been found on a careful examination of the foregoing list in connection with the authenticated map on file in the general land office, of the survey of the Southern Pacific railroad route, that the lands fall within the twenty miles lateral limits of said route, and that *the said lands so far as the records of the general land office show are free from conflict*, it is hereby recommended that the tracts described covering four hundred and forty thousand nine hundred acres and eight-five hundredths of an acre be approved and carried into patent as the lands falling within the grant by the act aforesaid to the said *Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may issue "all mineral lands," should any such be found in the tracts aforesaid*, but this exclusion, according to the terms of the statute, "shall not be construed to include iron and coal."

G. W. LAMOREAUX,
Commissioner.

To the Honorable Secretary of the Interior."

8. The secretary of the interior approved the order of the commissioner in the following order:

"Department of the Interior,
Washington, D. C., June 27th, 1894.

Approved) Covering four hundred and forty

thousand nine hundred acres and eighty-five hundredths of an acre.

HOKE SMITH,
Secretary."

EXHIBIT E.

CONGRESSIONAL JOINT RESOLUTION OF JUNE 28, 1870.

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as maybe, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty seven; and upon construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president as provided in the act, making a grant to said company, approved July twenty seventh, eighteen hundred and sixty six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27th, 1866, *expressly saving and reserving* all the rights of actual settlers, *together with the* other conditions and restrictions provided for *in the 3d section of said act.*"

4

FILED.
DEC 20 1912
JAMES D. MAHONEY,
CLERK.

Supreme Court of the United States

EDMUND BURKE,
Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, *et al.*,
Appellees.
No. 279

SUPPLEMENTAL BRIEF OF APPELLANT EDMUND BURKE

RELATING TO SEVENTH CERTIFIED QUESTION.

EDMUND BURKE,
Attorney in Pro. Per.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

EDMUND BURKE,
Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY *et al.*,
Appellees.
No. 682.

SUPPLEMENTAL BRIEF OF APPELLANT EDMUND BURKE,

Attorney in Pro. Per.

This supplemental brief will be devoted to the dual questions, namely, the legal effect of the acceptance by the Southern Pacific Railroad Company of a patent containing an exception of *all mineral lands,* known and unknown inserted in the patent pursuant to the agreement of the defendant railroad company and the United States.

I.

The contention of appellant is that the exception in the patent of all mineral lands included known and unknown mineral lands.

(A) That such exception, in the granting Act of July 27, 1866, covered and included known and unknown mineral lands was definitely settled by this Court in the *Barden* case.

(B) That such an exception in the patent, in any event, but gives expression to the intent of the Statute is obvious.

(C) Viewing the lands granted in the Act of July 27, 1866, as a gift to the Southern Pacific Railroad Company, it is obvious that it remained with the United States to determine the quantity and quality of the gift.

(D) Viewing the same grant (and patent) as a contract, it is equally obvious that it was a legal right for the contracting parties to agree on and to determine the quality of the land that should be included in the grant and to agree and to bind each other as to the quality of such land, by the insertion of the mineral exception, and to insert such terms of description and of conveyance as might be agreed on or which would carry into effect the *intent* of the granting statute.

(E) Now and at the time of the grant of July 27, 1866, and at the time of the patent, July 10, 1894, it was the law, and the settled policy of the United States, that no mineral land should be acquired from the United States by the railroad land grant companies, and the grant or gift was made by the United States and accepted by the defendant railroad company in full light of such law and policy.

(F) From the date of the grant in question, and prior thereto, and down to the time of the *ex parte* ruling of Secretary Hitchcock in 1904, it was the policy of the law, and the sole practice of the land department, in construing such grants, to include in the patents, issuing thereunder, a mineral exception of known and unknown mineral lands and such patents covered many millions of acres of lands.

(G) From the date of the grant the defendant railroad never expressed an objection to such policy and practice on part of the United States, *but, without objection or dissent accepted* the same and recorded such patents in various Counties of California and acted under the same for many years.

(H) That, until at least the ruling of Secretary Hitchcock in 1904, it was the practice of the defendant

railroad company to include in its conveyance of lands, specified and described in such patents, *a reservation to the United States of lands by it conveyed that might be determined to be mineral in character* and such subsequent deeds were necessarily accepted by its grantees, subject to such exception or reservation, and we contend *that such subsequent* reservation is conclusive on the question of acceptance and intent of the defendant railroad company.

In connection therewith let us suppose that a section of land thus and in such manner conveyed by the railroad company, defendant, to John Doe should prove to be richly mineral in character and under the grant, patent, and subsequently reserved conveyance of the defendant railroad company, the United States should lay claim to the title thereto, in a suit against the said John Doe, will it be contended that John Doe could successfully argue that he and the railroad company illegally entered into the agreement and thus defeat the action of the United States?

II.

The exception in the patent but gave expression to its base, namely, the grant of July 27, 1866, and in no event may the evidence of title, the patent, be greater in its legal effect than the base of such title.

As the evidence of such grant it must conform to such title and the presumption that it does so conform is necessarily based on the presumption or fact that the question of fact, namely, the mineral character of the land conveyed was determined prior to the issue of the patent.

Regardless of any argument regarding presumption of examination, of any determination concerning the quality of the land, the two following propositions cannot be disputed, namely:

1. *The patent bears on its face the statement* that the quality of the lands had not been determined by the Land Department prior to the issuance of the patent, and

2. That the defendant railroad company accepted such patent without objection or dissent and with full knowledge of *the fact of non-antecedent determination* of the quality of the land.

As a matter of law and as pointed out in many decisions of this Court, the patent will be presumed to have been accepted, in the absence of dissent or objection on part of the patentee, without actual delivery and the date of such presumed acceptance will be of the time when the patent has been recorded in the General Land Office.

Leroy v. Jamison, 3 *Sawyer*, 369 (per Mr. Justice Fields sitting at Circuit).

In this case, however, it specifically appears that the patent *was actually received and accepted* by the defendant railroad company and it was actually recorded in the office of the recorder of the County of Fresno, California, by the defendant railroad company on the 26th day of February, 1895, some eight months after the patent was executed, the date of execution being July 10, 1894.

The acceptance of the patent by the defendant railroad company was complete in every detail, there being not only a presumed but an actual acceptance followed by recordation in Fresno County by the defendant railroad company.

Now, *some eighteen years after such fact*, the railroad company for the first time questions the legality of the transaction and urges that the mineral exception is nugatory and void, the base of its contention being that such mineral exception of *known and unknown* mineral lands constitutes an unlawful limitation of and diminishes the grant or contract which, as a matter of legal fact, also excluded from its operation *known or unknown mineral lands!*

Of course such a contention is futile and such contenton must be resolved against the defendant corporation and if it is to prevail in this controversy, it would be necessary to place the decision on other grounds, but we contend that all other avenues of escape are closed to the defendant railroad company by reason of its unqualified acceptance of a patent that simply gave expression to the voice of the granting statute, namely, that under the guise of such statute it would not be possible for the defendant railroad company to take and retain mineral lands, *known or unknown mineral lands.*

The claim of the railroad company in this particular instance is wholly without equity. It has never been in possession of the controverted lands—has never expended a dollar thereon and so far as the record shows has never paid a penny in taxes. Its claim is purely *technical* and opposed to the wishes and policy of the law and of the United States.

That the acceptance of the particular patent herein precludes the defendant railroad company is established by the following authorities:

1. *Leroy vs. Jamison,* 3 *Sawyer,* 369, in which Mr. Justice Fields speaking on the subject said:

> "It has been assumed, rather than stated, in the argument of counsel, that when the government is bound, the patentee is also bound *without* reference to his assent on the subject; but nothing is farther from the fact. *No one can* be compelled by the government any more than by an individual to become a purchaser or even to take a gift. *No one can* have property, with its burdens or advantages, thrust upon him *without his assent.* In order, therefore, that the patent of the government, *like a deed of a private person,* may take effect as a conveyance, so as to *bind* the party to whom it is executed and transfer the title to him, *it is essential* that it should be accepted. As the possession of

> property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, *whether the conveyance be a patent of the government or a deed of an individual, will always be presumed* in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance.
>
> "There is in this respect *no difference* between *the patent of the government and the deed of a private individual.*"

The opinion of Mr. Justice Fields in such regard was specifically cited and approved by this court in the following case; namely:

United States v. Schurz, 102 *U. S.,* 399, where this Court said "The subject is very fully and ably discussed by Mr. Justice Field in the case of *LeRoy v. Jamison,* 3 *Sawyer,* 369," and has also been cited approvingly by the California Supreme Court and several other Courts. The case has never been modified, criticised or restricted in any other case.

Coupled with the opinion of Mr. Justice Fields in *Fremont v. Flower,* 17 *Cal.,* 199, to us, the case seems conclusive of this controversy.

In the latter case Mr. Justice Fields, then Chief Justice of the Supreme Court of California, said (p. 225):

> "The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation *and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals.* From the operation of conveyances of this character, that is, of individuals, the minerals of gold and sliver are not reserved *unless by express terms.* They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the

patent, the instrument of transfer of the governmental proprietors, the United States, *no interest in the minerals remains in them without a similar reservation.*"

Counsel will not contest the proposition that as between individuals the acceptance of a deed excepting and reserving mineral or mineral lands to the grantor would be conclusive as against the grantee.

If the rule announced by Mr. Justice Fields in *Fremont v. Flower,* namely, that the patent of the United States is to be construed under the rule relating to the construction of deeds between individuals then this case is ended. A grantee in the case of deed between individuals would:

1. Be bound by the mineral exception.

2. Would be estopped from disputing the title of his grantor in the minerals or mineral lands.

The ruling of Mr. Justice Fields has never been modified in such particular but on the contrary has always been sustained and is sustained by the cases.

If it be contended that the statute of July 27, 1866, did not warrant the inclusion of the mineral exception, the first answer is, *such* was the contemporaneous construction of the statute for forty years by those whose duty was to construe the statute and carry it into effect and such construction will generally control this Court.

If the defendant railroad contends here as it did in the Courts below, namely, that it received *no consideration* for the inclusion of the mineral exception, the answer will be that it was not entitled to receive any compensation for *relinquishing* what it *was not entitled to receive,* namely, mineral lands.

After the decision in the Barden Case the railroad land grant companies were persistent in their attempts to evade the law and resorted to every barrier of the law to defeat the statute and the policy of the United States. Before the

Barden case it was claimed that only the few *known* mines in imperial domain granted to the railroads were precluded from the operation of the grant.

Later the contention was that the "grant in the patent" could not be limited by the mineral exception as the exception might be as extensive as the grant and thereby defeat the same. *The defendant railroad company is proceeding under the theory that the Courts only lack common sense.* For instance, the patent under consideration, No. 22, carries or covers 440,000 acres while the suit of the government to recover the mineral portion thereof includes or covers only 115,000 acres and this suit includes only 3,200 acres. Thus, practically, the co-extensive theory of repugnancy is destroyed.

The claim of the United States is based on a thorough geological examination of the lands described in patent No. 22 and only about one-third (⅓) were found to be mineral but we think if every acre in that patent was determined to be mineral it would not affect the matter for it was not for the defendant railroad company to say what lands should be granted and the law *forbade* the *granting* of mineral lands and if every acre in the patent was mineral land it would simply follow that such land would not pass to the defendant railroad company.

It must be remembered, that, *as a fact* the theory that the exception might be as extenisve as the grant has been demolished. The government claims, after exhaustive examination, that only about twenty-five per cent (25%) of the lands included in patent 22, are mineral in character.

Under the grant, as based on the miles of construction between Goshen Junction and San Jose, the defendant railroad was entitled to about 2,500,000 acres of land. *At least* 80% of those lands have been determined to be agricultural in quality. The report of Commissioner Knox

shows that the railroad defendant has 10% of all the timber in the United States. Since the date of the Hitchcock ruling in 1904, the defendant railroad company has received *unexcepted* and *non-reserved patents* for upwards of ten million acres of land. It has received patents for thousands and thousands and thousands of acres of the richest agricultural land in the World—in Imperial Valley and under the great Governmental reclamation dam of the Colorado near Yuma—"The Yuma Project." *Of all the myths* in this case, the theory of "co-extensive repugnancy" is the most *absurd*. Even before the Barden case the theory was repudiated by the Supreme Court of California in the case of McLaughlin v. Powell, 50 Cal., 64, and it seems to us, under the *Barden case,* that in law, the theory is not tenable in any event.

The California Supreme Court said, considering the subject:

> "The fact cannot be assumed *that all* the lands described in such patent are mineral lands, *as* the exception *does not necessarily extend to all the tracts granted."*

The defendant railroad company was not obliged to accept a "repugnant patent," but it elected not only to do so but expressly agreed the "repugnant" proviso should be inserted in the patent.

We assume this Court will take judicial cognizance of the fact that only a very small percentage of the *immense* grants to the Pacific Railroads have proven to be mineral in character *and that every acre of mineral land lost has been compensated by lieu selections within the idemnity limits of the grants.*

The exception of streets, blocks, houses, alleys, etc., repudiated by this Court in *Deffeback v. Hawke* (supra) was,

prior thereto, many times passed on and repudiated by the Supreme Court of Montana and the reasons for such repudiation were given in detail by the Montana Court and simply re-affirmed in this Court without elaborate statement.

The cases on the subject were collated and digested in *Talbot v. King* (Montana), 9 *Pac. Rep., pp.* 435-6, where the Court said:

> "The principles enumerated in these cases apply with much force to a case where the land office, without authority of law, inserts an exception into the granting part of the patent, whereby *the title of the patentee is defeated.* The Pawnbroker mining claim, at the time of the issuance therefor, was a valid claim and possession, under existing laws of Congress, *and the patentee* was entitled to the *exclusive* possession and enjoyment of *all the surface ground therefor.*
>
> *There was no law depriving him* in any manner of the right of such possession. *He had purchased* the property and paid for it and *was entitled to a conveyance of the full and complete title.*
>
> As between individuals he stood in a position to compel such a conveyance. There is no law authorizing the land department *to except the surface* ground from the conveyance or in any other manner abridge the title of the purchaser * * *"

The transcript in the Deffebach-Hawke case does not contain the patent passed on, but in the analagous case of Weibbold v. Davis, 139 U. S., 507, the same question arose and the same ruling was made as in the Deffebach-Hawke case. A copy of that patent will be found in the appendix to this supplemental brief. The briefest examination of the case will show that there had been the fullest and most complete determinations of all questions of fact, and the patent on its face showed such facts and also showed *complete compliance* with the law on part of the purchaser and, of course, any attempt to limit his surface rights by excepting

therefrom streets, blocks, alleys, etc. Still, Judge Ross based his opinion that our exception was void on the language in those cases.

Our proposition in such regard is so self-evident it is, we submit, unnecessary to argue further that the Deffebach-Hawke and Weibbold-Davis cases are not authority for the position of Judge Ross.

In connection therewith it is pointed out in the same Montana cases that the townsite patent contained the following exception:

> "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper or to any valid mining claim or possession held under existing laws of Congress."

This exception in a patent has always been held valid and binding. *No one has ever successfully disputed the validity of such an exception*, BUT *there is nothing in the townsite act* that authorized the inclusion of such *an exception in the patent.*

Why then is its inclusion valid? For the simple reason that the exception gives expression *to the intent of the granting Act.*

The exception of gold and silver and known mineral in the basic Act is not broader than the language of our granting Act that excluded "all mineral lands." If the former exception could be carried legally into a patent it is *unreasonable* to argue, we submit, that the latter exception could not legally be inserted in a patent.

There is as much authority for such insertion in the last as in the former instance.

All the patents that issued for confirmed Mexican grants in California under the Acts of 1851, 1860 and 1864 pursuant to the treaty of Hidalgo-Guadalupe contained the

exception that the said patent should not be conclusive of the rights of third persons, and this Court, and the Supreme Court of California have had many occasions to pass on the exception and followed it in every instance, but there is no direct instruction in the Acts of March 3, 1851, or any subsequent Act of Congress to insert such an exception in the patent and the exception is valid simply *because it gives expression to the intent of the statutes* regulating the issuance of a patent and such a patent is held to be binding on the patentee in the absence of express dissent, and is only conclusive as between him and the United States and is not conclusive as against third persons, *but* it would be conclusive as against third persons if it were not for the insertion of the exception which simply gives expression to the statute, although there is no direct instruction in the statute to insert the exception in the patent.

In *Reynolds v. Iron Silver Mining Co.*, 116 U. S., 687-97 the placer mining law, and a placer mining patent containing an exception not directly authorized by the statute in such instance, was passed on by this Court. The plaintiff claimed under a patent which contained, amongst others, the following exception:

> *"2. That should any such view or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it."*

The placer mining law under which that patent issued contained no direction to insert such an exception in the patent; like the instance here, *it was simply declaratory of the law.*

The statute under consideration in that case expressly precluded from its operation, lodes, veins or mineral bear-

ing quartz from its operation and the land department construing the statute carried the exception into the patent.

The statute under consideration here expressly precluded mineral land from its operation and the land department construing the statute carried the exception into the patent.

The patentee in that case as in this case claimed the patent was conclusive of the character of the land and carried the full legal title to the patentee of all land, and all rights, within the exterior boundaries of the exterior boundaries of the patent.

This Court, amongst other things said:

> "Yet, while the lode is not mentioned in the patent, the Court (below) held that for the purposes of this suit the title to it was conferred by that instrument. *It appears to us* that such a proposition is opposed to the *policy of the Acts of Congress* in the different rules in which it applies to granting title to placer mines, and to vein, lode and fissure mines; *to the express language of the statute* and to the RESERVATION IN THE PATENT ITSELF * * *. It is said that this part of the patent (the exception) is void because it is in conflict with the rights of the claimant of a placer mine under the Acts of Congress.
>
> Without deciding on the effect of the *acceptance without protest* of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, *it is sufficient to say that these conditions but give expression to the intent of the statute.*"

Can it be successfully contended *here* by the defendant railroad company that the mineral exception in the patent that was by it accepted, *without protest,* did not give expression *to the intent* of the Act of July 27, 1866?

In considering that case and some of the cases in which it was later cited, it must be remembered that "all mineral

land" was by statute and under the policy of the law reserved from disposition under any method other than provided for the mining laws. Only under the mining laws was it possible or legal to secure mineral lands.

The defendant railroad company has evidently realized the difficulty of its position, and all through the litigation has contended that the mineral exception was void by reason of the contention that the patent having issued it must be presumed that there was in fact an antecedent determination by the land department that all the land embraced within the boundaries of the patent was non-mineral. The land was not described in the patent *as a whole*, but was conveyed by legal subdivisions, namely, by sections and approximately *seven hundred sections* were described in the patent. The determination required was of a "fact," not the mere issuance of a patent which, as said by Judge Bean in the Oregon Circuit and by the California Supreme Court in Gale v. Best, and by Judge Gilbert, *on its face repelled any inference that there* had been an antecedent determination of the "fact" whether the lands described in the patent were mineral or agricultural. That such antecedent determination was absolutely necessary is stated by every and all of the cases, and to us it seems to be trifling with the law and dignity of this Court for the defendant to assert that the *patent shows that such duty was performed.* Suppose the patent read, as the record shows, "There having been no antecedent determination of the mineral or non-mineral character of the land herein described the patent is issued subject to the following exception, yet excluding, etc.," would the defendant railroad company be in a position to assert that this Court must presume by reason of the *issuance of the patent* that there had been an antecedent determination of the fact of quality? Will it be contended

that the inclusion of such language would strengthen our claim that there was no such antecedent determination when the mineral exception as included conclusively repels any inference that there had been any such determination?

As we stated in our general brief, there are many classes of patents in which, following a *practice of a half a century*, exceptions of various kinds have been inserted in patents without provision in the granting Act expressly directing the insertion of those exceptions and their validity has never been questioned, and in none of those instances *is there as much* direction for the insertion of an exception as in the patent under consideration here. The granting Act of July 27, 1866, expressly precluded mineral lands from passing under the granting Act, the joint resolution of June 28, 1870, reiterated the preclusion of mineral lands and provided the Secretary of the Interior should issue a patent, expressly saving and reserving * * * together with the other conditions and restrictions provided for in the 3d section of said Act. (Act of July 27, 1866.)

The only "other" restriction in said granting Act and its 3d section provided *"that all mineral lands be and the same are hereby excluded from the operation of this Act."*

How could mineral lands be *"saved and reserved"* except by an exception in the patent?

In only one way; namely, by an antecedent examination and determination of the fact of quality and a statement of such fact in the patent (Barden Case).

In the absence of such an antecedent determination, how could mineral lands be "saved and reserved"?

Only by a mineral exception in the patent. Go a bit further. The Secretary is about to issue a patent *based wholly* on the records of the various divisions of his department. His duty at that moment is to *"save and reserve"* certain

mineral preclusions. The same are not of record in his department. No investigation has been made—no determination of the fact of quality has been made, still it is the duty of the Secretary to "reserve" them, reserve them to the United States.

How shall he reserve them? He does not know that they exist; he cannot describe them!

How then can he "reserve" them? Only in one way, and that by an exception in the patent. So then, he, the defendant railroad applicant, silently standing by, directs a patent to issue, yet excluding by the transfer all mineral lands. The railroad applicant makes no protest. The patent issues and the railroad company, without objection or protest, *actually accepts* (not by implication or protest) the patent and Records it in Fresno County, California, and disposing of many portions of the land described in the patent, actually carries the mineral exception in favor of the United States *into its deeds* to its various grantees!

How does the railroad patentee meet the proposition that it is not bound by the acceptance of the patent? By various suggestions, namely:

1. That the exception was not authorized by the granting act or by the joint resolution.
2. That even if authorized the mineral exception may not be inserted in a patent where there has been an antecedent determination of the fact of quality.
3. That the railroad applicant was entitled to patent for all the sections with its list, *not mineral in quality*, and it being the duty of the Secretary to determine the fact of quality and thereupon to issue a patent for all land found to be *non-mineral*, the issuance of the patent, notwithstanding its language established the conclusive presumption that the Secretary did his duty, and the issuance of the patent is the determination of the fact that the land is non-mineral and therefore the insertion of the mineral exception was a nugatory Act.

In answer to such a strained construction, let us consider the exception not as an exception, but as words contained in the patent. It is elementary that a patent must be read as and interpreted *as a whole.* All its language must be taken *together* and all considered. Let us lay aside the theory that a *"mineral exception"* is under consideration, but rather a patent is before this Court *to be considered as a whole*—that is law. Now what is the fact and how is the patent to be construed? All of us are bound by its recitals. If the patent stated in the language of the Barden case that the *land* was non-mineral, that would be an end of this case. If the patent recited the land was mineral the patentee would be out of Court.

If the patent recited there had been an antecedent finding of fact that the land was agricultural, the patent would be conclusive.

If the patent was entirely silent on the question of quality and if this Court was wholly wrong in the Barden Case, then it might be presumed that the Secretary of the Interior fully performed his duty and that the issuance of the patent was a determination of all antecedent facts necessary to uphold it.

We think it will be also conceded that if the patent contained a recital that the fact of quality had not been decided that independent of any mineral exception the patent would not be conclusive.

We think, also, it is the law that if the Secretary of the Interior in violation of law issued a patent without antecedent determination of the fact of quality that the legal title to the mineral lands remained in the United States and those mineral lands were open to location, under the mining laws of the United States under the theory that the legal title to the lands described therein did not pass thereunder, but remained in the United States and that the land remained as part of the public domain.

Now let us examine the patent and ascertain if it does not appear on the face of the patent *that* there was no antecedent determination of the fact of quality and in that connection we find:

1. That the patent contains no recital which show such a determination.
2. The patent contains no statement concerning the quality of the land.

And in such connection the record on which the patent is based shows:

1. That there was no such antecedent determination.
2. That the approval of the railroad application for the patent expressly provided no mineral land should be included in the patent.

After the granting clause followed these words: "Yet excluding and excepting 'all mineral lands' should any such *be found in the tracts aforesaid,* but this exclusion and exception according to the *terms* of the statute, shall not be construed to include 'Coal and Iron Lands.' "

1. It must be conceded that that paragraph is a part of the description and part of the conveyance.
2. The rule of construction of the paragraph must be in favor of the United States and against the railroad patentee.
3. Can any rule of construction that is applicable to this case resolve that paragraph into any other conclusion than that it is a statement that *there had been no antecedent* determination of the fact of quality?

What is the exclusion? Is it of lands known to be mineral? What does it refer to?

To lands that *may be found* to be mineral? Such lands could only be found to be mineral by *future* search and in-

vestigation! If they *had* been found to be mineral or non-mineral the case would be ended, but the language indicates at least within the rule of construction that the question was an open one, that nothing was known concerning the same and that the entire matter was left for *future* investigation and determination, and if any lands were *found* to be mineral those legal subdivisions would not pass to the railroad patentee.

Such was the construction placed on the language of the paragraph by the California Supreme Court prior to the Barden decision and such was the construction placed on the paragraph by Judge Bean in the Oregon Circuit Court, and by Judge Gilbert, and by the California Supreme Court.

This construction, the reasonable, rational and *true in fact* construction is borne out by the record on which the patent is based, the acceptance of the same by the defendant railroad company, *without protest*, and the subsequent acts of the defendant railroad company *in carrying the substance of the paragraph into its deeds and conveyances to third persons.* As between individuals there could be no possible escape and if a patent is to be construed like a conveyance between individuals, the question would be ended. Of course, we admit, that if the lands had been earned and their quality defined it would not be legal to place any words or language into the patent that would diminish the grant but that question is not here for under *no* circumstances did the language *diminish the quantity* or quality of the grant.

Judge Ross in his opinion in the Roberts case did not at all pass on this question but toward the end of his opinion quoted *Deffebach v. Hawke, supra*, as follows:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of *conveyance, with recitals showing a compliance with the law* and the conditions which it prescribed."

Very true, but that case is not here. If the patent in our case contained "recitals *showing compliance with the law and the conditions which it prescribed*" this suit would never have been instituted or if instituted would have expired quickly and we are quite content to stand on the citation for our patent contains *not one* recital showing compliance with the law requiring an antecedent determination of the *fact of quality*.

Elsewhere in the general brief and in this supplemental brief we have fully discussed the Deffebach-Hawke, and Weibbold-Davis cases, and showing, we submit, that they are not authority against us.

It is true that an officer of the land department cannot limit a grant but it is equally true that such officer cannot add to the grant lands which were precluded from the operation of the grant. The contention of the defendant railroad amounts to this: that by the patent, in violation of law the officers of the land department passed to the railroad company a large acreage of mineral lands, and the result is the same whether the officers did not know at the time of patent that the lands were mineral. The officers could not legally enlarge the grant, still, if the contention of the railroad defendant be well founded, those officers did so enlarge the grant in issuing a patent without determination of the fact of quality.

A grant of all certain described lands as are not "legally claimed" by any other person *did not authorize* the issuance of a patent *until the rightful* claims of others *had been ascertained*. (*LaFayette v. Kenton*, 18 How., 198.)

In that case there was a patent to General LaFayette describing the out boundaries and containing a reservation of all tracts of land legally claimed by other persons and when General LaFayette later attempted to *enforce the patent* he was defeated *through force of the reservation* and

there was no express direction in the grant to carry the exception into the patent and the insertion was valid and operative simply because it gave expression to the intent of the granting Act.

The railroad company might have refused and returned the patent and in that event it would have been inoperative and the railroad company would not have been bound by the same and could have waited until the determination of the fact of quality and then received a patent to the land that it was entitled to receive.

Maguire v. Taylor, 8 Wall., 671.
LeRoy v. Jamison, supra.

The foregoing discussion naturally leads us to the remaining enquiry as to whether the defendant railroad company by its acts of acceptance is estopped to deny the validity of the mineral exception—a long line of state and federal cases culminating in *Cowell v. Colorado Springs Co.*, 106 U. S., 55, squarely hold that: "A person claiming under a deed containing a condition, *exception* or reservation is bound thereby and cannot take the conveyance *without assuming all its terms, conditions and obligations.*" We assume such a proposition as between individuals will not be disputed but it may be contended that the rule is not applicable in this instance because, as alleged in the Courts below, the mineral exception is utterly void and that an estoppel may not arise out of a void premise. That a patent with an exception, reservation or condition is to be construed as would be a deed, with like exceptions, between individuals is pointed out by Mr. Justice Fields in Fremont v. Flower, *supra.* If a decision to the contrary exists the writer has been unable to find it. Therefore we deem it unnecessary to discuss the subject further and pass to the second division of the subject, namely, where one having

the right to accept or reject a transaction he becomes bound by the transaction and cannot avoid his obligation or effect by taking an inconsistent position therewith and is thereby estopped from questioning *the validity* and effect of such an agreement or act. The only qualification is this: In order to constitute an estoppel the agreement must have been voluntary with a knowledge on the part of the corporation of its right *(Cyc. Vol. 16, pp. 789-90-91, with state and federal citations).*

Passing to the question whether an estoppel runs against the defendant railroad, we concede in the instance of an antecedent determination of the fact of quality, that if the agreement to insert the mineral exception was forbidden by law after such determination it would be inoperative but there is a radical difference between an act for which there is no legal direction and an act that is itself illegal or specifically forbidden by law. If the mineral exception was not authorized by the granting act and joint resolution it may still be said that those acts did not interdict the insertion of the mineral exception and thereby the parties had the right to include the same in their actual or implied agreement for it was consistent with the intent of the statute, the policy of the law, good morals, the rights of the parties and the real legal, equitable fact, and especially so, as at that time in the absence of an antecedent determination of the fact of quality, the defendant railroad company *was* not *entitled* to a patent and the department was not authorized to issue one without inserting the mineral exception (*Barden Case*).

In connection therewith we think that as the defendant railroad company accepted a patent bearing on its face the fact that there had been no antecedent determination of the fact of quality, that it is now estopped from claiming that there was such an antecedent decision.

"Qui non prohibit quod prohibere protest assentire videtur," such is the ancient language of the law on the subject and we can make no stouter argument.

In the courts below the defendant did not argue very strongly against the proposition but was content to argue that in any event complainant was not privy to the transaction and could not avail himself of the estoppel and that only the government could plead estoppel.

It is obvious, we say, in answer, that the *only result* of the estoppel was to retain the legal title to the mineral lands in the United States and if the legal title to the mineral lands remained in the United States THEN the mineral lands were subject to location under the mining laws of the United States, and when our title is clouded by a claim of the defendant railroad we have the right, we submit, to contend that under the estoppel running to the United States, the legal title to the land in controversy remained in the United States and thereby we had the right to make the mining location and to institute this suit.

If the land is mineral then by making the mineral location we became privy to the paramount title *and to the estoppel running to the paramount title.*

II.

WHAT WAS THE LEGAL EFFECT OF THE INSERTION OF THE MINERAL EXCEPTION IN THE PATENT PURSUANT TO THE ASSENT AND AGREEMENT OF THE SOUTHERN PACIFIC RAILROAD?

It appears by the record, the certificate of the Circuit Court of Appeals, that the mineral exception was inserted in the patent *pursuant to the express agreement and assent of the Southern Pacific Railroad Company.*

Arguing against the effect of such agreement in the courts below, the defendant railroad company asserted that the agreement was not binding and gave two reasons for such contention, namely:

> 1. That they had no control over the form of the patent and were not bound by the unauthorized acts of the officers of the land department.

The reply to such answer is obvious—the admitted fact in the record here is that the defendant railroad company *consented in fact, independent of any implication, to the insertion of the mineral exception.*

In the second place they contended that the agreement was without consideration and therefore not binding. No further argument was made.

The contention is fallacious for two reasons, namely:

> 1. The railroad company was not entitled to receive any consideration for agreeing not to take what the law said should not be taken under the non-mineral grant, namely mineral lands.
>
> 2. As a matter of fact a very valuable consideration did flow to the defendant railroad company, namely, it received, excluding the mineral lands contained in patent, No. 22, upwards of 325,000 acres of land, subsequently determined to be agricultural in character without any antecedent examination or *expense on its part,* and at a time when the railroad company needed the asset and long *prior* to the time the corporation was entitled to receive the agricultural land.

If counsel would consent to refer to the necessities of the corporation that made valuable the issuance of such patents to it at said times there would be no question of the great consideration that flowed to the defendant railroad at such times.

There is nothing involved, complex or intricate, concerning the legal result of such mineral exception agreement. *It was in accordance with the practice of* the land department, *the policy of the law, the intent of the statute, the wishes of the parties and the necessities arising from the non-antecedent examination and determination of the quality of the land.* Forty thousand words would not enable us to make a further and stronger argument and the question is so clear that we submit it without any further contention, except to say that thereby and as a result thereof the legal title to the controverted lands remained in the United States and they *continued* to remain subject to location or relocation under the mining laws of the United States.

It is true when there is no power or authority by law in officers or agents, no void act of their's can be cured by aid of the *doctrine of estoppel,* (2 *Herman on Estoppel and res adjudicata,* 1365; *Rush v. City, etc.,* 80 Cal., 6; *Martin v. Zellerbach,* 38 Cal., 300; 99 Am. Dec., 365; *Thompson v. Doaksum,* 68 Cal., 593; etc). But it will be found on examination of *all the cases* where in such instances it was held the doctrine of estoppel was not applicable, the ruling was made in instances where the act was either in violation of positive law or where there was no law that permitted the transaction, as for example, where municipal officers without charter or other authority contracted for municipal improvements, etc., or in proceedings *in invitum* where no divestment of property may be made without a strict compliance with law or in instances where a Board of Supervisors or Superintendent of Streets, attempt to grant extension of time for the performance of a contract, after the expiration of the time limited in the contract.

(*Beveridge v. Livingston,* 54 Cal., 54; *Fanning v. Schammel,* 68 Cal., 428; *Dougherty v. Coffin,* 69 *Cal.,* 454).

It is like a contract between individuals where there is an agreement to pay a greater rate of interest than is permitted by law. The fact that a party under such agreement made no protest for a while and paid at various times the forbidden rate, would not estop him from subsequently setting up the invalidity of the agreement.

Many illustrations might be made along similar lines and instances.

A corporation is forbidden by law to issue its stock on credit but B contracts with a corporation to buy stock on time payments and the certificate is issued on a payment of ten (10%) per cent and from time to time B makes further payments, until the entire legal amount is paid to the corporation.

Will it be contended that B is not thereafter estopped to deny the validity of his agreement? Still the original agreement was forbidden by law.

The California Civil Code provides that a certificate issuing under certain circumstances for stock not fully paid, must show on its face the amount paid in at the time of issue. Suppose a certificate issues in contravention of the statute and after full payment passes for value to a third person, is not the corporation estopped to deny the validity of the certificate?

Even if it be admitted "there was no power or authority in law for the officers of the land department to insert the mineral exception," it does not follow in an instance when the patentee *had the absolute right* to reject the patent and to call for a proper one, that the assent of the patentee was a puerile act, not binding on him, and especially so since the law forbade the passing of mineral lands.

Take for for instance, the case of a Mexican patent issuing under the laws of 1851, 1860 or 1864. A makes application for a confirmation of a Mexican Grant claiming a

grant two miles square and the grant is confirmed by the Board of Land Commissioners and the United States District Court and is surveyed under the Act of 1864 and the survey is in accordance *exactly* with the decrees of confirmation and thereupon the survey is approved by the Department of the Interior, but later the land department tenders the claimant a patent for a lesser area or excluding from the patent the easterly portion of the inner bay of San Pedro (*De Guyer v. Banning,* 167 U. S., 723), and the patentee accepts the same and remains silent for twenty years!

Will not he be estopped from denying that the land officers had no right to exclude the easterly portion of the inner Bay of San Pedro *(containing islands that passed under the grant and decrees of confirmation) from his patent (De Guyer v. Banning, supra.)*

There was no authority in law for the making of that exception. Nevertheless the Court held that under the exception in the patent *the islands in the excluded portion of the bay did not pass to the Mexican grantees.*

So it was in the case of the patent of General La Fayette (*supra.*)

Neither De Guyer or General La Fayette were permitted by this Court to say that the exception did bind them.

In Fremont v. Flower, supra, Mr. Justice Fields said that an exception in a patent of minerals, of gold and silver, was necessary in order to retain the legal title in the United States.

It was absolutely beyond the power or jurisdiction of the land officers to make a grant of mineral land to the railroad corporation.

If a patent based on an apparently perfect record and perfect on its face and in its recitals issued through fraud, imposition or mistake, the legal title would pass and no

subsequent locator could question the transaction or take upon himself the right of protecting United States. If the United States refused to bring the proper action the incident would be closed, but where the legal title did not pass under a patent, perfect or imperfect on its face the land would be open to entry (*Doolan v. Carr*, 125 *U. S.*, 625) and the holder of such a patent could not successfully say that such an entryman was estopped to deny the validity of his patent.

In consideration of the question of estoppel we submit the following rules should control the Court in this instance:

> I. Every part of the patent must be considered so that effect may be given to what may appear to be the controlling intention of the grantor (*Pugh v. Mays*, 60 *Tex.*, 191.)
>
> II. The estoppel will be limited by the apparent intention of the parties (*Colonial Bank v. Hepworth*, 36 *Ch. Div.*, 36.)
>
> III. Estoppels are mutual and bind both parties or neither (*Schuman v. Garrett*, 16 *Cal.*, 101; *Franklin v. Dorland*, 28 *Cal.*, 115; 87 *Am. Dec.*, 111; *Gordan v. City of San Diego*, 101 *Cal.*, 522.)

For example: If it be insisted that the United States is estopped from disputing any statement, recital or term of conveyance used in the patent, it is equally true that the defendant railroad company is also estopped from disputing any term of conveyance or any part of the description contained in the patent. If as said by the California Supreme Court in several cases that the *Exception is part of the description*, it follows that both the Government and the railroad company are bound by it and mutually estopped to deny it. *Every reservation and exception* contained in a deed between individuals *has always been construed as a part of the description.*

A conveyance without a description would be a *nullity*. The patent conveys by legal subdivisions *excluding* the mineral subdivisions.

The title to the non-mineral subdivisions is perfect; *no title* passed to the mineral subdivisions—the patent does not purport to convey the land as a whole, *but specifically by non-mineral* legal subdivisions. For example, A owns one hundred city lots numbered from 1 to 100; diamonds have been found on some of them. A conveys the one hundred lots to B, yet expressly excluding from the transfer such of the lots as may be found to contain deposits of diamonds. Is it not the rule in such instance that B would be estopped from claiming title *to the lots* on which it was ascertained there were deposits of diamonds? The discovery of such deposits on seventeen lots would not defeat the title to the remainder, but the term of description would estop B from denying that the title to the seventeen lots remained in A. The estoppel would be mutual and perfect. In this case the term of description applied to some *seven hundred sections,* while in this suit the term of description affects only *five sections.*

EXAMPLES.

Where a grant by metes and bounds excepts a tract by the name under which it is *generally known,* the tract so excepted does not pass by the grant (*Truett v. Adams, 66 Cal.,* 218.)

Where a deed described the land conveyed by courses and distances and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed (Painter v. Pasadena, etc., 91 Cal., 74.)

Reservation forbidding grantee from furnishing to others *rock* taken from the premises sold is valid (Parkovich v. S. P. Ry. Co., 87 Pac., 1097.)

A reservation in a grant is to be interpreted in favor of the grantor (Martin v. Lyodd, 94 Cal., 195.)
Butler v. Gosling, 130 *Cal.*, 422.
Smith v. Slears Rancho, 132 *Cal.*, 178.
Seans v. Ackerman, 138 *Cal.*, 583.
Adams v. Hopkins, 69 *Pac.*, 228.
13 *Cyc.*, 676-682.
16 *Cent. Dig. Cols.*, 607-614.

It seems to us that we are in such privity with the paramount title as to enable us to successfully contend we may avail ourselves of the estoppel running to the United States as the only effect of such estoppel was to keep the title in the United States and subject the lands to mineral location.

Since the writing of the main brief in this case the Circuit Court of Appeals, Ninth Circuit (Nov. 1, 1912), reversed the ruling of Judge Bean in the case of *Eastern Oregon Land Co. vs. Willow River, etc.*, by the vote of Judges Ross and Morrow, Judge Gilbert dissenting, and the net result of the decision is, that Judge Ross reiterated his opinion made in the Roberts case, with Judge Gilbert disagreeing with him, while Judge Morrow passed the subject and based his vote for reversal on grounds independent of the mineral exception. Judge Ross simply contented himself with a citation from his opinion in the Roberts case. He gave no additional reasons.

Judge Morrow did not pass on the question in any way and we may only speculate concerning his position on the question, except that he apparently conceded that "known" mineral lands were excluded from the patent.

His reference to the question was as follows:

> "* * * with the exception to the title to the lands in Secs. 21 and 27 in T. 14 S., R. 42 E., there is no serious controversy as to the title of the lands along Willow Creek described in the Bill of Complaint and

claimed by the complainant. It is practically conceded that the title to such lands passed from the United States to the State of Oregon by terms of the grant contained in the Act of Congress of February 5, 1867 (14 Stat., 409), and the Act of June 18, 1874 (18 Stat., 80), and that by mesne conveyances the title to the said lands vested in the complainant; nor is there any controversy that the granting Act, is by its terms a grant *in prae senti* and that the riparian rights appurtenant to the lands were not reserved or otherwise disposed of by the United States, but passed with the title to the lands to the State of Oregon and to its grantees. With respect to the title of Sections 21 and 27, the question is presented whether these lands are within the terms of the grant. They are within the primary limits of the grant and patents were issued therefor by the United States to the Dalles Road Military Company, and the title, if any, passed by grant or patent has become vested in complainant. But it is objected on the part of the defendant that the title to mineral land did not pass by either grant or patent and that the lands in these two sections are mineral land. * * * With respect to the ownership of Sections 21 and 27, the defendant alleges that said land, and particularly that part thereof occupied by said dam and to be occupied by its reservoir, is mining land and that the same is more valuable for its gold deposits than for any other purpose, and that it is and always has been absolutely valueless for any other purpose, except that of mining for gold; alleges that more than thirty years ago said land was filed upon as placer gold mining claims by predecessors in interest of the defendant under and pursuant to the laws of the United States governing the acquiring of placer gold mining claims; that the persons who so filed upon said land as such mining claims held, worked and occupied the same as mining claims, and that by proper mesne conveyances from said parties, said land has been conveyed to the defendant, and it was the owner thereof; that the defendant's predecessors in interest in said mining claims for the purpose of working said mining claims appro-

priated and used all the waters of Willow Creek naturally flowing through said lands during the Summer and Autumn seasons and used the quantity, etc. * * * The objection that the title to the land upon which the defendant was constructing its dam and reservoir was in dispute presents two questions, one of law and the other of fact. * * * The complainant holds a title to Section 27 derived from a patent issued by the United States to the Dalles Military Road Company on the 23d day of May, 1902; and it is contended on behalf of the complainant that the title to the land described in the patent passed to the grantee by proper conveyance and is now vested in the complainant and that the character of the land is not now open to inquiry unless it should be made to appear in a proper action that the patent had been procured by fraudulent misrepresentation on the part of the grantees as to the character of the land. No such claim of fraudulent misrepresentation is made in this case, but it is insisted that the grant did not embrace mineral lands and that the officers of the land department had no authority to issue a patent for lands containing mineral and that such lands were excluded by the terms of the patent.

The patent conveys in T. 14, etc., certain designated subdivisions of Section 21, containing 120 acres, etc., but provides 'Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid.' It was contended by the complainant in the court below, and the contention is renewed here, that the issuance of the patent by the Government of the United States to complainant's predecessor in interest was a conclusive adjudication that the land described in the patent was non-mineral.

It was admitted by the court that this probably was true if the patent contained no reservation, but it was the opinion of the Court that the reservation manifested an unmistakable intention on part of the Government not convey mineral lands and repelled any inference that the Department has adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.

The complainant contends that the issuance of the patent was a final adjudication by the only authority having jurisdiction to make the adjudication that the land described in the patent was of the class of lands granted by the Act under which the patent issued.

This identical question was before the Circuit Court for the Southern District of California in the case of *Roberts v. Southern Pacific R. R. Co.*, 186 F., 934. In that case Judge Ross held that where Congress had provided for the disposition of any portion of the public domain of a particular character and had authorized the officers of the land department to issue a patent for such land on the ascertainment of certain facts, such department had jurisdiction to inquire into and determine the existence of these facts, and in the absence of fraud, imposition or mistake, its determination was conclusive against collateral attacks.

From this decision complainant appealed to this Court and thereupon the Court certified the question in various forms pertinent to that and another case before this Court, to the Supreme Court of the United States, for instructions as to a proper decision of the questions.

The questions are certified under the title of two cases, namely, Burke v. S. P. R. R. Co., No. 1981, and Lamprecht v. S. P. R. R. Co., No. 2028. Whether a patent issued under the circumstances disclosed in the present case conveys to the grantee an absolute title to the land described therein subject only to direct attack for fraud, misrepresentation or mistake, or whether the conveyance is subject to the reservation excluding mineral lands should any such be thereafter found in the trusts conveyed, *must therefore* await the decision of the Supreme Court upon the questions submitted in the cases referred to.

But, assuming that the patent is open to this collateral attack, we are of the opinion that such an attack is not supported by evidence in this case. * * * The defendant is not a claimant of the land in dispute for its mineral character or its mineral deposits, nor, indeed is it a claimant there or elsewhere for land on account of its mineral character of its mineral deposits.

> It has taken possession of the land in dispute *not for* the purpose of carrying on mining operations but to *improve water for irrigation purposes.* * * * That the refendant has taken possession of the land in controversy to maintain and operate a dam for the storage quarters for the purpose of irrigating and bringing under cultivation desert and unproductive lands for *agricultural* purposes *appears to be a sufficient answer to defendant's general claim that the land is mineral land.* * * * *If the land is more valuable for such agricultural purposes as the defendant proposes than for its mineral deposits* then the land *belongs* to the complainant under the grant and patent *as agricultural land."*

We submit the appellees may extract no comfort from the opinion of Judge Morrow. He simply held that on the record that Judge Bean, a very great lawyer and the former Chief Justice of the Supreme Court of the State of Oregon, had erred in denying complainant an injunction *pendente lete.* Judge Ross agreed with him, basing his decision on his former opinion that the mineral exception was nugatory, but Judge Morrow did not agree with him on that subject. He cited Judge Bean and then cited Judge Ross, showing they radically differed on the question of the mineral exception and the record shows Judge Gilbert, equally as learned and distinguished as Judge Ross, agreed with Judge Bean rather than with Judge Ross.

Judge Morrow voted for reversal on grounds entirely independent of the mineral exception, on the ground that the plaintiff *was not* a *mineral* claimant, and the further ground that on the showing of plaintiff that the land *was agricultural* and had been taken up by the plaintiff *for agricultural purposes.* That is not the case here.

The only particular contention we have to make is concerning that portion of Judge Morrow's opinion where, dis-

cussing the testimony, he said, "There was no evidence that the boundaries of any claim had been marked upon the ground so that such boundaries could be readily traced, nor was there any evidence that a notice of such claim had ever been posted upon the ground or filed in the United States Land Office, nor was there any evidence tending to show that any steps had been taken under the laws of the United States to obtain title to the ground as mineral ground."

1. Our mining claims were taken up as legal subdivisions of surveyed sections; in such instance no marking on the ground is necessary.

Such a course is only necessary in an instance where placer locations are made on unsurveyed ground or where less than a legal subdivision is located.

2. Our Bill of Complaint alleges that locations notices were posted and recorded, etc.

3. It is evident the learned judge misspoke when he said there was no evidence that the notice of location was ever filed in the United States Land Office. There was and is *no law* that even permitted a mining locator to file his notice of location in a *United States Land Office*. In absence of statutory direction only a posting was necessary, and on absence of a local regulation no filing or recordation anywhere was necessary as the federal statute is silent on the subject.

Sometimes under local rule or State legislation mining recorders well selected and recordation was made mandatory with them or with the County Clerks, but it was never required by local rule, State legislation or Federal requirement that a mining location should be recorded or filed in a United States Land Office, and as a matter of fact it could not even appear at all in a United States Land Office until the mining locator got ready and was willing to apply for a patent.

4. There is no obligation or duty on part of a mining locator even to take any steps to obtain title under the laws of the United States to ground as mineral land.

In the appendix will be found the opinion of Judge Gilbert. We submit that he is entirely right, and his opinion sweeps away the mistakes into which Judge Ross fell. Of all the judges and judicial officers who have passed on the subject since the commencement of this suit, Judge Ross stands alone.

The Supreme Courts of Oregon and California differ with him concerning the effect of a patent for "known mineral" land; no one agrees with him that the "exception" could possibly limit or restrict the grant. Judges Bean and Gilbert positively disagree with him concerning the validity of the mineral exception. Judge Morrow in no way supports his views and convention, forbids us citing Judge Wolverton as he made no formal announcement. We respectfully submit that Judge Ross was wrong.

EDMUND BURKE,
Attorney in Pro. Per.

APPENDIX.

Exhibit "A."

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE EASTERN OREGON LAND COMPANY, a Corporation,
Appellant,
vs.
THE WILLOW RIVER LAND AND IRRIGATION COMPANY, a Corporation,
Appellee.
No. 2007.

(DISSENTING OPINION, U. S. CIRCUIT COURT OF APPEALS.)

Gilbert, Circuit Judge, dissenting:

The appellee was engaged in constructing a dam across Willow Creek for the purpose of impounding the winter flood waters of that creek, and diverting the same for use in irrigation. The appellant brought the present suit to enjoin the construction of the dam, claiming equitable relief on two grounds: First, that the dam was being constructed upon, and when completed would flood certain lands belonging to the appellant, and, second, that by impounding the flood waters of the creek, the appellee would prevent the occasional flooding of 3600 acres of lands of the appellant lying at a considerable distance below the dam, which lands were alleged to be subject to annual overflow from the waters of said creek, and capable of irrigation therefrom. There was no tenable ground for demurring to the complaint on (*1) the ground that the appellant had

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(*Page number of original opinion.)

an adequate remedy at law for the recovery of the possession of the ground occupied by the dam or flooded thereby, for the relief sought as to such lands was coupled with a prayer for an injunction against preventing the annual overflow of the 3,600 acres of land of the appellant so alleged to be annually irrigated thereby. Upon the issues and the testimony, the court below reached the conclusion that as to the lands actually occupied by the dam and to be flooded thereby, the appellant's remedy was at law, and that no ground was shown for an injunction against the diversion of the winter flood waters from the lands of the appellant lying below the dam, for the reason that the evidence showed that no substantial injury would result to the appellant therefrom. It is now held by the majority of this court that the decree of the court below should be reversed.

One member of this court is of the opinion that the decree should be reversed on the ground that the lands which the appellee will occupy for its dam and reservoir are included within the boundaries of a patent from the United States to the appellant, and that although said lands are mineral lands, the exception in the patent whereby mineral lands are reserved is void. *With that view I am not in accord.* The patent was issued under the Act of February 25, 1867, which provided that the grant should not embrace mineral lands of the United States. The patent was issued May 28, 1902, and it repeats the exception which was contained in the Act in these words: "Yet excluding and excepting all mineral lands if any such be found in the tract aforesaid." *It is clear* (2) *from the language of the patent that no investigation whatever was made by the officers of the Land Office as to the mineral character of the lands, for it grants lands which "have been listed by the duly authorized land agent of said company, as shown*

by its original lists approved by the local officers and now on file in the General Land Office." As was said by the court below, the patent, when read in connection with the act "manifests an unmistakable intention on the part of the Government not to convey mineral lands, and repels any inference that the Department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral." The appellee acquired the title of the mining claimants to the lands so to be occupied by the dam and reservoir. Those lands lie in the creek bed in a canyon, and have been occupied as mining claims, some of them since 1862, and the most thereof since 1869. On April 25, 1908, one of the appellant's agents wrote to another of its agents that the land "involves about seven miles of creek bed, which has been mined over more or less for the last 35 years." In another letter he wrote, "we understand this land along Willow Creek has been mined off and on ever since 1862." In my opinion these mineral lands were excluded from the patent and never passed to the appellant.

The view of the other member of this court is that, *conceding that known mineral lands are excluded from the patent,* there is, notwithstanding, one tract of 10 acres, the southwest quarter of the northwest (3) quarter of the southwest quarter of Section 27, included in the lands to be occupied as a reservoir, upon which no mining location has been made, since no mining location filed in the County Clerk's office describes that particular portion of the section, and that therefore that tract of land passed to the appellant, and that the use to which the appellee proposes to put it affords ground for injunction for the reasons, (1) that the threatened trespass will operate to the destruction of the estate of the appellant in that 10 acres, (2) that the appellant has no adequate remedy at law, for the reason that the appellee is insolvent and unable to respond in damages, and that, in any view of the case, the appellant is

entitled to an injunction against the diversion of the flood waters which occasionally irrigate the lands of the appellant lying below the dam. These grounds for reversing the decree, I submit, are not sustained by the evidence. The evidence, I think, fully justifies the conclusion of the court below that all the lands which are to be occupied by the dam and reservoir are mineral lands, are in the possession of the appellee, and have been in the adverse possession of the appellee and its predecessors in interest for more than ten years prior to the commencement of the suit. The fact that a certain tract of 10 acres in Section 27 is not included in any mining location as the locations appear on file in the County Clerk's office should not be held to overcome the testimony of witnesses that it has actually been occupied for mining purposes. Mining locations as they have been marked upon the ground should prevail over (4) the calls and distances of the recorded notices thereof. But even if no mining location had actually been placed upon that particular tract, it is nevertheless mining land, situated in a mineral country, and surrounded by mining claims. This 10 acres of mineral land was in the actual possession of the appellee under a claim of title. The threatened acts of the appellee could cause no destruction thereof or injury thereto. It is undisputed that the land is of no value for agricultural purposes, and that its sole value is in the mineral which it may contain. A complainant out of possession may obtain an injunction against trespass upon real estate only to prevent destruction of the property, and only in cases where it is sought in aid of an action at law which is pending or is contemplated. Buchanan Co. vs. Adkins, 99 C. C. A., 246; Earhardt v. Boaro, 113 U. S., 537; Whitehead v. Shattuck, 138 U. S., 146.

The only proof of the insolvency of the appellee as ground for the appellant's resort to equity for relief is

found in a copy of certain proceedings in bankruptcy filed in this court since the submission of the case herein, which shows that the appellee has become insolvent. There was no allegation of its insolvency in the pleadings in this case, and no suggestion thereof was made in the court below or in the record which is presented to us. I submit that the proceedings in bankruptcy have no proper place in the case which is before us, and that we have no right to consider them. The question (5) before us is whether the court below erred in the decree which was rendered upon the pleadings and proofs which were before it.

Nor do I think that the trial court erred in its conclusion that the impounding of the winter flood waters of Willow Creek would result in no injury to the appellant's lands lying below the dam. The appellant in its bill alleged that 3600 acres of such lands which it owned were subject to the annual overflow of the waters of the creek, and capable of irrigation therefrom. There is no evidence even tending to show that more than one-tenth part of the 3600 acres has ever been reached at any flood of the creek. On the contrary the evidence fully sustains the conclusion of the court below that the lands of the appellant which were subject to the occasional and irregular winter overflows consisted of five or six small low-lying parcels of unimproved, uncultivated and unenclosed land whose sole crop is wild grass, the total quantity of which does not exceed 40 or 50 acres. The evidence shows that the winter flood does not occur every year, and that it floods these lands but two or three days and at a time when they are either already saturated with rain and snow, or are frozen so that the water merely passes over their surface. There is credible evidence, also, that these winter floods are an injury rather than a benefit to these lands.

Upon reading the whole of the evidence in this case, no unbiased mind can reach any other conclusion but that the

real object of the suit is not to prevent injury (6) to the appellant's lands, but to checkmate the scheme of the appellee to impound the flood waters of Willow Creek in order that the appellant itself might have the opportunity to organize a scheme to do the very thing which the appellee was engaged in doing. This is fully shown by the correspondence that passed between the appellant and its agents during the seventeen months preceding the commencement of the suit. As early as December, 1907, the appellant's agent at Vale, Oregon, received written instructions to keep close watch upon the operations of the appellee. Said the letter: "It may become necessary to organize the bench owners and the present water users who have sold, to resist the monopoly of the main flow of the creek." On December 23, 1907, the general agents at Portland wrote to the appellant at San Francisco suggesting a combination of land owners to bind themselves together to refuse to take any water from anyone, "thereby making it impossible for the company seeking to supply them to do any business, which would cause a lapse of their rights." The letter recommends that Clagett, the agent at Vale, be instructed to encourage the organization of the land owners in a scheme to oppose the plans of the appellee's predecessors in interest, and suggests that he become a member of the Land Owner's Committee so that he might obtain inside information concerning developments. The letter suggested that he would be in a position to "checkmate" the land owner's organization. In that letter it was further said: "Mr. Clagett's view that you have no defined water rights in connection with your Willow Creek lands means, we think, at the normal flow. We (7) suppose, as riparian owners of several tracts, you have certain legal rights which could be asserted against the monopoly of the flood waters." On January 6, 1908, the same agents wrote concerning the

efforts of the appellee to obtain control of the reservoir site, and of the strategic points along the creek by purchase, and said that if they did so, "they will probably have the bench land owners at a serious disadvantage. The latter must anticipate their obtaining this control. They should insist in a forceful way on a declaration by the syndicate of their plans. If no satisfaction is obtained, then action should be taken, with the assistance of skilled lawyers and engineers, to prevent the syndicate from getting detrimental control. Your position is the same as that of the individual bench land owners. Your lands will be deferred in their development if some way of bringing water to them is not opened up before the syndicate has obtained the control the methods they employ indicate." On January 10, 1908, the same agents wrote to the appellant as follows: "In their present state, your lands in this district are practically only nominally valuable. An irrigation undertaking will make them very valuable, if precaution is taken to bring them in or keep them out, as the shrewdest policy will dictate." On April 1, 1908, Clagett wrote the general agents at Portland: "Must confess we have misgivings in regard to the present situation. We have felt all the time that the Eastern Oregon Land Company was making a mistake in not adopting an active program (8) in regard to Willow Creek, and if we were confident that these people only contemplated a small undertaking, would advise a consideration of steps to secure options upon a portion of Willow Creek lands which control vested rights." When Clagett on the witness stand was asked what was the intended purpose of taking options on lands along the creek, he answered: "It was desired to checkmate them." The word "checkmate" appears more than once in the correspondence, and to checkmate the scheme of the appellee, Clagett testified was "undoubtedly" the purpose for which the present suit was brought.

In all of the correspondence and in the notices which were served upon the appellee, there is nowhere a suggestion that the construction of the dam and reservoir and the impounding of the flood waters will cause any actual injury to the appellant's lands either above or below the dam, or deprive the appellant of flood waters for the irrigation of any portion of the lands, or that it had ever applied any of those waters to a beneficial use.

I submit that the case as it comes to this court should be determined upon the issues that were framed in the court below, and that upon those issues and the evidence, the decree of that court was correct and should be affirmed.

(Endorsed:) Dissenting Opinion. Filed Nov. 11, 1912, F. D. Monckton, Clerk.

Exhibit "B."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 219.

JAMES A. TALBOTT, SPECIAL ADM'R OF ANDREW J. DAVIS, APPELLANT,

vs.

HENRY WEIBBOLD.

* * * * * * *

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title 32, there have been deposited in the General Land Office of the

United States the plat and field-notes of survey of the claim of Heinrich C. Wiebbold upon the Gold Hill lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that in pursuance of the said Revised Statutes of the United States, Henry C. Wiebbold did, on the nineteenth day of September, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 438 in the series of said office designated by the surveyor general as lot No. 65, embracing a portion of township three (3) north of range eight west of the principal meridian, in the Summit Valley mining district, in the county of Deer Lodge and Territory of Montana, in the district of land subject to sale at Helena, containing seven (7) acres and sixty-hundredths of an acre of land, more or less, and, according to the returns on file in the General Land Office, bounded, described, and platted as follows. with magnetic variation at as hereinafter stated: Beginning at the southwest corner of the claim, an iron bar one and one-fourth (1¼) of an inch in diameter driven in the ground at the intersection of Quartz and Main streets, in the town of Butte, from which the southeast corner of J. H. Leffler's house bears, with magnetic variations at twenty (20) degrees east, north forty-five (45) degrees fifteen (15) minutes west at the distance of sixty-nine (69) feet, the northeast corner of W. Park's house bears south fifty-four (54) degrees forty-five (45) minutes west at the distance of thirty-nine feet, the northwest corner of a carpenter's shop bears south fifty-nine (59) degrees fifteen minutes east at the distance of sixty (60) feet, and the southwest corner of a house bears north forty-five (45) degrees fifteen (15) minutes east at the distance of eighty-seven (87) feet; thence from said corner No. 1 north six (6) degrees west two hundred and seventy-two (272) feet to a shaft, three hundred and forty

(340) feet to a corner No. 2, a post four (4) inches square in mound of stone marked "M. C. 56, 2," from which corner No. 2 of lot No. 43 patented to Charles S. Warren with his claim upon the Woolman lode, bears, with magnetic variation at eighteen (18) degrees forty-five minutes east, north twenty (20) degrees forty-five minutes east at the distance of three hundred and eighty-three (383) feet; the southeast corner of lot No. 39, patented to William A. Clark with his claim upon the original lode, bears north fifty-five (55) degrees thirty (30) minutes east at the distance of four hundred and sixteen (416) feet; a shaft bears south eighty (80) degrees east at the distance of three hundred and thirty-one (331) feet, and a shaft bears south seventy-nine (79) degrees thirty (30) minutes east at the distance of four hundred and six (406) feet; thence from said corner No. 2 south eighty-seven (87) degrees forty-five (45) minutes east forty-six (46) feet to east side of Main street, one hundred and ten (110) feet to road, four hundred and ninety-four (494) feet to the west side of Wyoming street, six hundred (600) feet to small gulch, seven hundred and ten (710) feet to Town gulch, one thousand and thirty-five (1,035) feet to east boundary of Butte town site, eleven hundred and forty-two (1,142) feet to corner No. 3, a post four (4) inches square in mound of stone marked "M. C. 65, 3," from which the corner common to section seven (7), twelve (12), thirteen (13), and eighteen (18), in township three (3) north of range eight (8) west of the principal meridian, bears, with magnetic variation at nineteen (19) degrees forty-five (45) minutes east, north forty-one (41) degrees fifteen minutes east at the distance of eleven hundred and eighty-six (1,186) feet; thence from said corner No. 3 south seventy-seven degrees thirty minutes east three hundred and eighteen (318) feet to corner No. 4, a post four (4) inches square

in mound of stone marked "M. C. 65, 4"; thence with magnetic variation at nineteen (19) degrees thirty (30) minutes east, south six (6) degrees east fifty-four (54) feet to corner No. 5, a post four (4) inches square in mound of stone marked "M. C. 65, 5," from which the southwest corner of lot No. 45, A, patented to Dennis Leary et al., with their claim upon the Parrott lode, bears north fifty-one (51) degrees east at the distance of three hundred and thirty-five (335) feet, and corner No. 3 of lot No. 63, made for the claim of Andrew J. Davis upon the Baltic lode, bears south thirty-nine (39) degrees fifteen (15) minutes east at the distance of four hundred and twenty-five (425) feet; thence from said corner No. 5 south eighty (80) degrees forty-five (45) minutes west four hundred and thirty-three feet to east boundary of Butte town site, five hundred and ninety-seven (597) feet to corner No. 6, a post four inches square in mound of stone marked "M. C. 65, 6"; thence with magnetic variation of nineteen (19) degrees forty-five (45) minutes east, south eighty-five (85) degrees west ten feet to road, two hundred and seventy (270) feet to east side of Wyoming street and east end of Quartz street, eight hundred and thirty-four (834) feet to the place of beginning, containing seven acres and sixty-hundredths (60/100) of an acre of land, more or less, and embracing fourteen hundred and sixty (1,460) linear feet on the said Gold Hill lode, as represented by yellow shading in the following plat.

(The plat by agreement is here omitted.)

Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Heinrich C. Wiebbold and to his heirs and assigns the said mining premises hereinbefore described as lot No. 65,

embracing a portion of township three (3) north of range eight (8) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents and of fourteen hundred and sixty (1,460) linear feet in the said Gold Hill vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining and also all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; Provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits, excepting and excluding, however, from these presents all town property rights upon the surface, and there are expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same: And provided, further, that nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of

whatsoever nature thereunto belonging, unto said Heinrich C. Weibbold and to his heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as Lot No. 65, with fourteen hundred and sixty (1,460) linear feet of the Gold Hill, through its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depth as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Montana may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the City of Washington, the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty,—Independence of the United States the one hundred and fourth.

by the President:

R. B. HAYES.

By WM. H. COOK, *Secretary.*

S. W. CLARK,

Recorder of Gen. Land Office.

* * * * * * * *

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten pages, numbered from one to six, inclusive, contain a true copy of an extract from the transcript of the record in the case of James A. Talbott, Special Adm'r of Andrew J. Davis, Appellant, vs. Henry Weibbold, No. 219, October Term, 1890, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 19th day of November, A. D. 1912.

JAMES H. MCKENNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

IN THE

Supreme Court of the United States

No. ———

EDMUND BURKE, *Appellant*,

vs.

THE SOUTHERN PACIFIC RAILROAD AND KERN TRADING AND OIL COMPANY, *Appellees*.

Technical Brief by Professor Charles F. Mabery Setting Forth the Reasons that Petroleum Is Within the Meaning of the Term "Mineral" as It Was Used in the Acts of Congress Reserving Mineral Land from the Railroad Grant Involved in this Case. An Answer to the Fifth Question Certified.

At the date of the Acts of Congress referred to above, July 27th, 1866, the petroleum industry in the United States was well advanced and oil territory was widely exploited. In California extended investigations had been made, especially by Professor S. F. Peckham and Professor J. D. Whitney, State Geologist of California, the results of which were widely circulated by publication,

especially in Professor Whitney's report to the California Geological Survey. The California Petroleum Company was then exploiting oil territory with the assistance of Professor Peckham as chemist. At the date of the said Acts of Congress, therefore, the Members of Congress could not have been uninformed of the presence of petroleum in the lands granted in the said Acts, as the investigations above referred to embraced some of the lands granted by said Acts of Congress.

It must, therefore, be assumed that petroleum was included as a mineral in the reservation of mineral lands. Again, since oil territory had previously been located, and in Section 3 of said Act all mineral lands were excluded, but with an option on an equivalent area of agricultural land, petroleum land must have been included in said Acts either as mineral land or as agricultural land. Certainly, the framers of said Act did not intend to assign a title to petroleum territory as agricultural land; therefore, petroleum territory must have been included in the reservation of mineral land.

Section 2 of the Pickett Bill reserves mineral land for exploitation and purchase, reserving coal, oil, gas and phosphates, plainly classifying these products as minerals. There seems to be a good foundation, therefore, for the belief that petroleum was included within the meaning of the term "mineral" by the framers of said Acts.

Since the evident intent to include petroleum as a mineral in said Acts must indicate a general usage at that time of such meaning, it is pertinent to ascertain from the contemporary literature of petroleum the basis for including petroleum as a mineral deposit.

The general definition of a mineral as any constituent of the earth's crust was then accepted as it has been since. A distinction based on inorganic and organic composition

cannot be applied, for such mineral substances as coal—anthracite, bituminous,—Albertite, pitches, asphalts and mineral tars, all of organic origin, have as much an organic composition as petroleum.

Referring to the early literature of petroleum it is plainly evident that petroleum was classified together with the substances referred to above, especially because they have a common origin, notably the pitches and asphalts. For example, in the near vicinity of the great Pitch Lake at La Brea, Trinidad, are large producing oil wells.

In describing the deposit of Albert coal (Albertite) in New Brunswick in 1865 (American Journal of Science and Art), the eminent geologist, C. H. Hitchcock, mentioned cavities in the coal filled with petroleum, and he ascribed to the Albertite and oil a common origin. He stated that "the carbonaceous veins of Albert coal, Canadian asphalt, and liquid petroleum have many characteristics of metallic veins."

In the early days of the California petroleum industry S. F. Peckham spent much time in exploiting that oil territory, and in his comprehensive Government Report of Petroleum in the United States in 1881 he devoted much space to the description of the mineral products,—asphalt, maltha and petroleum. He alluded to the operation of producing petroleum as oil mining. Peckham classified asphalts, mineral pitches, maltha and petroleum as varieties of Bitumen as a generic term for those mineral deposits. He described the flow of petroleum from tar springs. He frequently alluded in that report to petroleum as included in mineral deposits.

In an address at the Franklin Institute, Philadelphia, in 1895, on the subject, "What Is Bitumen?" published in the proceedings of the Institute, Professor Peckham plainly defines petroleum as a mineral, as follows:

> "It therefore seems to me desirable that the word bitumen should be once more, and clearly, defined, as the generic name of that large class of substances occurring in nature as minerals and consisting chiefly of mixtures of compound of carbon and hydrogen, with nitrogen, sulphur and oxygen as more rare constituents. Under this genus should be ranged, as species and sub-species—all of the natural combustible gases, naphthas, petroleum, malthas and asphaltums."

In the same address he said further:

> "I think that the Trinidad pitch, so-called, is properly to be considered a mineral species."

In an address by Professor S. P. Sadtler before the Franklin Institute in 1895, published in the proceedings of the Institute, occurs the following statement:

> "The word bitumen in mineralogy is applied to hydro-carbon mixtures of mineral occurrence, whether solid, liquid or gaseous. With this understanding of the nature of bitumen, we can adopt the very concise classification of Professor S. F. Peckham, who published, in 1885, the 'Special Report on Petroleum' for the Tenth Census. It divides bitumen into:
> "Solid: Asphaltum. Fluid: Petroleum. Volatile: Naphtha. Gaseous: Natural gas—of burning springs"

In his annual address as president of the Geological Society of America in 1898 the eminent geologist Dr. Edward Orton stated:

> "The crust of the earth contains but few mineral productions that awaken such widespread interest as the bituminous series. The search for oil and gas is attended with much of the excitement that goes with the search for the precious metals."

The early authorities on the geological occurrence and formation of petroleum,—Dr. T. Sterry Hunt, Dr. Winchell, Professor J. D. Whitney and Dr. Edward Orton,—all agree in ascribing a common origin,—shellfish,—in the formation of limestone and petroleum, the shells forming the limestone and the organic bodies petroleum. This relation was clearly demonstrated in the Trenton limestone and in the Corniferous limestone, both of which carry enormous stores of petroleum.

With reference to the specific character of the petroleum occurring in California territory, it should be borne in mind that petroleum from whatever source, as, for example, California, Pennsylvania, Russia or Texas, must be understood as having the same general composition, differing only in the proportions of the various constituents,—California petroleum contains less of the lighter products, such as gasoline and burning oil, while Pennsylvania petroleum contains less of the heavier constituents that form the main body of California petroleum. But petroleum from any oil territory contains constituents to be found in petroleum from any other oil territory. It may further be said of California petroleum that it approaches more nearly the qualities of the mineral asphalts. In fact much of it has been defined as maltha, an intermediary natural product between the lighter petroleums and the mineral asphalts.

In view of the composition of California petroleum and the agreement of scientific authority with commercial use in defining it as a mineral product, at the time of the passage of said Acts of Congress and subsequently, we are of the opinion that in the said Acts of Congress petroleum or mineral oil was within the meaning of the term "mineral" in the reservation of mineral land from the railroad land grants.

EDMUND BURKE,
Attorney in pro. per.

JAN 8 1913
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,

against

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING & OIL COMPANY,
Appellees.

No. 279

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Appellant's Brief of Argument and Reply Brief.

FREDERIC R. KELLOGG,
ROBERTS WALKER,
EDMUND BURKE,
Of Counsel for Appellant.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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IN THE

Supreme Court of the United States.

EDMUND BURKE,
Appellant,

AGAINST

THE SOUTHERN PACIFIC RAILROAD COMPANY, KERN TRADING AND OIL COMPANY, *et al.*,
Appellees.

Appellant's Brief of Argument and Reply Brief.

This suit is before the Court on questions certified by the Circuit Court of Appeals on appeal to it from a decree of the Circuit Court dismissing the bill on demurrer thereto.

In view of the bulk of appellant's principal brief and the number of citations therein collated, the appellant desires to endeavor to further assist the Court by preparing an additional memorandum, the object of which will be to state somewhat more concisely and simply certain of the fundamental principles of law upon which the decision of the case will depend, and also to present certain aspects of the matter from somewhat different points of view than those adopted in the principal brief. It will

also contain our reply to the appellees' answering brief.

We shall first state, for the full information of the Court and without limiting ourselves to the language of the certificate——

I. The Essential Facts Involved in this Action.

1. The claim of the appellees is primarily based upon the original grant contained in the Act of Congress of July 27, 1866 (14 Stat., 292).

2. By the express language of this grant it was intended only to apply to "every alternate section of public land, *not mineral*," and it was provided further that "*all mineral lands be*, and the same are hereby excluded from the operations of this act." Patents "confirming to said Company the right and title to said lands" were authorized by Sec. 4.

3. To avoid danger of injustice to the Railroad Company it was further provided that in lieu of any mineral lands "a like quantity of unoccupied and unappropriated **agricultural** lands * * * may be selected."

4. The original grant of 1866 was confirmed with modifications by the Joint Resolution of June 28, 1870.

5. In this Joint Resolution the exceptions of the original grant were expressly reiterated and confirmed, the language being that upon the report that any section of the Railroad had been constructed as required by law "it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company * * * *expressly saving and reserving* all the rights of actual settlers

together with the other conditions and restrictions provided for in the third section of said Act approved July 27th, 1886" (*i. e.* among other things the restriction as to mineral lands).

6. At some time prior to May 14th, 1892, the Railroad filed an application for certain lands to which it claimed to be entitled by virtue of construction of a portion of the road.

7. On May 9th, 1892, one Madden, Land Agent of the Company, made an affidavit accompanying a list of lands, to the effect that the list in question was a correct list of a portion of the public lands claimed by the Railroad and that: "the lands are vacant, unappropriated and are not interdicted mineral or reserved lands and are of the character contemplated by the grant," etc. The list of lands accompanying Madden's affidavit included the lands described in the bill of complaint herein (Bill, Sec. 12).

8. The bill alleges that—

> "prior to the 9th day of July (error for May), 1892, all of the said lands mentioned and described herein were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws of the United States, and said several and divers mining locations were made by said divers citizens of the United States after a discovery of mineral on each of said mining claims embraced therein,"

and that, therefore, the lands in question were not public lands which could be patented under the Railroad grant, but were segregated by reason of their being mineral lands and because of these locations (Bill, Section 10; Certificate fol. 2).

9. It is also alleged that the Railroad *knew the lands in question were mineral lands* (Bill, Sec. 12).

10. It is also alleged that all said mining locations had been, prior to the application of the Railroad for patents, duly recorded in the office of the Recorder of the Coalinga Mining District, which was the proper place for recording such mining locations, and that the Railroad had knowledge of these facts (Bill, Sec. 11).

11. It is also alleged that the lands in question now are and at all times were mineral lands of great value (Bill, Sec. 5).

12. Two years and more elapsed before the patent in question was issued. During this period the bill and the second question certified *show that there was no investigation of, or hearing upon the question of the nature of those lands, and that no determination was made by the land office or Interior Department to the effect that they were agricultural and not mineral lands.* Various steps that were taken are set forth in the appendix to our principal brief (pp. 451-457).

13. On June 28th, 1894, the Commissioner of the Land Office approved the issue of the patent; but expressly excluded from this approval and from the transfer—

> "*all mineral lands* should any such be found in the tracts aforesaid" (Bill, Sec. 14; Appellant's Principal Brief, p. 456).

14. On July 10th, 1894, a patent was issued to the Railroad purporting to grant the lands in question.

The patent does not recite that the Congressional grants excluded non-mineral land. It does not re-

cite that the lands had been examined and ascertained to be non-mineral lands. It does not recite any notice to the prior locators by publication or otherwise; nor the taking of any steps whatsoever to comply with the directions of the Joint Resolution of 1870 directing the "saving" of all the rights, conditions and restrictions therein enumerated. *Nor does it in any way decide the lands to be agricultural and non-mineral lands,* such as were alone to be granted under the terms of the original Congressional enactments.

It simply consists of (1) numerous recitals (partly erroneous) of the terms of the Congressional grant; (2) a recital of the construction of a section of the Railroad in question; (3) a recital that the lands in question have been "duly listed under the act aforesaid" by the authorized agent of the Railroad; (4) a recital that the tracts in question are coterminus to the constructed line of road; (5) a description of the lands with their area; and (6) it then states that the United States of America—

> "have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. YET EXCLUDING AND EXCEPTING 'ALL MINERAL LANDS' SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID, but this exclusion and exception, according to the terms of the statute, shall not be constructed (*sic*) to include 'coal and iron lands'."

15. The bill then shows that the Railroad assented to the terms and conditions of the Congressional grants and accepted and recorded the patent in question (Bill, Sec. 19).

16. The bill alleges that the patent was issued without jurisdiction on the part of the Land Office (Bill, Sec. 17).

17. The bill then shows that the Railroad Company has never at any time had any actual, open, peaceable, notorious, public and physical possession of any part of the lands in question, but the lands have been at all times wild, open and unoccupied (Bill, Sec. 19; Certificate, fols. 2 and 3).

18. It is specifically alleged that the locators, under the prior mineral locations, never received notice of the Railroad's application for patent and never had any opportunity to contest the same; that no hearing was had to determine the mineral or agricultural nature of the lands and *that the patent issued without any such determination,* although the lands thus claimed to be patented were located within six miles of mining locations made pursuant to the mining laws of the United States, all of which was known to the Railroad, and that the lands in question were not more valuable for agricultural than mining purposes (Bill, Sec. 20-21; Certificate fol. 2).

19. On March 3rd, 1909, appellant and others entered on the lands in question and made mining locations on each quarter section thereof, pursuant to the mining laws of the United States, all of which were duly filed on March 6th, 1909, in the office of the Recorder of the County of Fresno, within which County appellant's lands are situated (Bill, Sec. 22).

20. Contemporaneously with the making of such locations there was a discovery of mineral by the locators (*id*).

21. That the lands had, prior to said location by appellant, been designated by the Department of the Interior as lands more valuable for mining than agricultural purposes (Bill, Sec. 23, Certificate fol. 3); that each of the said mining claims thus located is worth upwards of Sixty Thousand Dollars ($60,000) (Bill, Sec. 26).

22. The bill, therefore, prays that the appellees be estopped from claiming any right, title and interest in and to any of the lands involved in the suit, etc.

23. To this bill demurrers were interposed.

24. At the hearing in the Circuit Court the bill was dismissed, the curt opinion of Judge Ross being, however, based upon the opinion and record in *Roberts* v. *Southern Pacific Co.*, 186 Fed. Rep., 934, which, as we shall allow, differed materially from this case.

25. As a result of the appeal taken to the Circuit Court of Appeals, seven questions were certified to this Court. These questions are set forth on pp. 8 and 9 of Appellant's principal brief, and are also quoted and answered in Points XVI and XVII of this brief (*infra*).

II. The Points to be Considered upon this Appeal.

Inasmuch as the first, second, third, fourth and seventh questions depend largely, if not entirely, upon the decision of the same fundamental principles of law, it has seemed to us that, for purposes of the argument of this cause, it will facilitate the Court to have the appeal presented, first, by a consideration of the general principles involved, and,

secondly, by an application of these general principles to the particular questions certified.

We accordingly respectfully submit to the Court the following propositions:

POINT I.

Congress never intended that the Southern Pacific Railroad Land Grant should include mineral lands.

This is perfectly clear from the express language of Section 3 of the original grant of July 27th, 1866 (see p. 401, Appellant's Principal Brief), excluding mineral lands and giving the right of substitution of agricultural lands in lieu thereof, and also by the language of the Joint Resolution of 1870 in which the reservation of mineral lands was emphasized by the provision—

> "expressly saving and reserving all the rights of actual settlers together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866."

This is precisely in line with our uniform national policy which has never contemplated the exploitation of mineral resources by railroads receiving land grants.

The United States never chartered an East India Company. Neither did the Federal Government ever make a grant to a railroad limited only by metes and bounds. Invariably the mineral reservation appears, and in every case this reservation is explained by and correlated to other statutes controlling mineral lands. It is plain that the railroads were granted the farm and ranch and

timber values only, and that the mineral values were intended to be withheld from them. The following is a summary of the principal enactments.

A. Railroad Land Grants.

UNION PACIFIC, Act of July 1, 1862 (12 Stat., 489). The reservation was in the form of a proviso, "that all mineral lands shall be excepted from the operation of this act." As evidencing the estimate made by Congress of the value of the grant, it is also provided that lands not sold by the Union Pacific Railroad within three years after its completion shall be subject to settlement and preemption "at a price not exceeding $1.25 per acre, to be paid to said company."

NORTHERN PACIFIC, Act. of July 2, 1864 (13 Stat., 365). The mineral reservation is a proviso in Sec. 3 of the Act (13 Stat., 368).

ATLANTIC & PACIFIC, Act. of July 27, 1866 (14 Stat., 292). This is the statute involved in this appeal.

CALIFORNIA & OREGON, Act of July 25, 1866 (14 Stat., 239). "Every alternate section of public land, not mineral."

IRON MOUNTAIN, Act of July 4, 1866 (14 Stat., 83). Mineral lands were excluded by a proviso, and it was also expressly stipulated that a right of way only would be granted where the railroad had to be located on mineral lands.

LITTLE ROCK & FORT SMITH, Act of July 28, 1866 (14 Stat., 338). "*Provided,* that all mineral lands within the limits of this grant and the grant made in section two of this act are hereby reserved in the United States." See also Act of February 9, 1853 (10 Stat., 155).

WESTERN PACIFIC, Act of July 1, 1862 (12 Stat., 489). Mineral lands were excepted by a proviso.

TEXAS & PACIFIC, Act of March 3, 1871 (16 Stat.,

573). "Every alternate section of public land, not mineral."

B. Contemporaneous General Enactments.

Act of May 30, 1862 (12 Stat., 409). The privilege of settlement upon unsurveyed lands was extended to California, but with the proviso that the privilege did not include mineral lands.

Act of January 30, 1865 (13 Stat., 567). No act passed at the first session of the 38th Congress "granting lands to states or corporations to aid in the construction of roads or for other purposes * * * shall be so construed as to embrace mineral lands."

Act of July 26, 1866 (14 Stat., 251). This was the general permission to explore and occupy mineral lands in conformity with local customs.

Act of July 4, 1866 (14 Stat., 85). Relates to Nevada, but contains the clause carried into Sec. 2318 of the Revised Statutes, "In all case lands valuable for mines of gold, silver, quicksilver or copper shall be reserved from sale." In the Revised Statutes, the clause read "lands valuable for *minerals.*"

Act of May 10, 1872 (17 Stat., 91). This is now the controlling statute on mineral location.

Act of February 11, 1897 (29 Stat., 526). "Petroleum lands may be entered and patented under the provisions of the laws relating to placer mineral claims." See Act of July 9, 1870 (16 Stat., 217). Existing rights are protected by this statute.

From this review it is manifest (1) that Congress always intended to retain title in the United States to mineral lands; and (2) that mineral lands, including petroleum deposits, remain subject to entry, location and patent by private citizens. Every word in every statute shows the clear-

est intention on the part of Congress not to let the railroads take lands without regard to their mineral quality.

POINT II.

It appears, without contradiction, that the Railroad Company itself never had any right to expect that it would receive a grant of mineral lands.

This appears—

1. From the statutes above quoted.

2. From the language of the Madden affidavit, which states—

> "that said lands are vacant, unappropriated and are not interdicted mineral or reserved lands" (Appellant's Principal Brief, pp. 405-6; Certificate, fol. 2).

3. From the decision of the Commissioner expressly excluding all such lands (Bill, Sec. 14).

4. From the language of the patent which the Railroad received, accepted and recorded, providing—

> "Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid" (Appellant's Principal Brief, p. 418; Certificate, fol. 2).

POINT III.

As a matter of fact it now appears that portions of the land included in the 440,900 acres described in the Patent, are mineral lands of great value and that this was known to the Railroad long prior to its application for and receipt of the Patent in question.

See Bill, Secs. 5, 10, 11, 12, 16, 18, 20;
Certificate, fols. 2 and 3.

As this case is in the nature of a test case, it may not perhaps be improper to observe outside of the record, that approximately 45,000 acres of the lands described in the patent are mineral lands, and that these lands are of indefinite but certainly very great value, but only as mineral and not as agricultural land, estimates of this value by responsible persons running as high as $250,000,000.

To the extent that these lands have been located by mineral locators occupying positions similar to that of this appellant, the interests of these locators are involved in the present appeal, and to the extent that the lands remain unlocated, the interests of the United States are involved.

POINT IV.

The Railroad and the Kern Trading Company, the principal appellees in this case, appear, therefore, before this Court claiming to be entitled to property of great value which Congress expressly stated that it did not intend to grant and which it expressly appears that the grantee knew that it had no right to acquire.

Bill, Sec. 12.

POINT V.

It is respectfully submitted that the moral strength of the appellant's position, endeavoring, as he is, to stand upon the exact intent of the original grant, is so great that it cannot be overcome by any technical reasons advanced by those who claim in hostility to such intent, unless these reasons be of such overwhelming force as to be able to withstand the strictest scrutiny and test.

We ask the Court to keep in mind, in the consideration of this appeal, the following especial points:

1. No rights or interests of innocent third parties are involved.

2. There is no claim of change of position on the part of the appellees themselves of such a nature that an adverse decision would work injustice to them.

3. The situation is not embarrassed by any consideration of the effect of possession, occupancy or improvement of the lands in question which, as admitted by the demurrer, have always been and are wild, remote and unoccupied up to the time of relocation.

4. The granting statutes are carefully framed so as to avoid any injustice to the grantee if any lands described in the patent be excluded as being mineral lands, there being provisions giving the grantee the right to substitute equivalent agricultural lands in lieu of such mineral lands. These provisions are to-day in full force and effect *and ample lands are available for these purposes.*

POINT VI.

Upon seeking for the ground upon which the appellees base their claim to retain the benefits of lands which the United States never intended to grant and which the grantee knew it had no right to receive, we find this claim to rest not upon the Congressional grants, but upon the fact of the issuance of the Patent of July 10th, 1894, describing the lands in question.

Briefly, the argument of the appellees is—

1. That, although the grant was limited to non-mineral lands, yet the Land Department had juris-

diction to ascertain in the case of each tract whether or not the lands were non-mineral.

2. That, although the patent does not contain a recital of a decision to the effect that the lands were non-mineral lands, and although the patent expressly excludes and excepts all mineral lands, should any such be found in the tracts aforesaid, yet that the mere issuance of the patent raises the conclusive presumption that the Land Department must have examined and investigated the lands and ascertained that they were non-mineral lands and, therefore, were within its power to patent to the Railroad Company pursuant to the Congressional enactments.

In other words, the appellees' case must stand or fall, not upon *proof* that the Land Department adjudicated these lands in their favor, but upon a *presumption* of such adjudication, which presumption itself is in direct violation not only of the facts themselves but of the express language of the patent upon which the appellees' rights depend.

To analyze this situation still further, the appellees' rights must necessarily flow—

First. *Not from the grant,* which is absolutely hostile to their contention.

Second. *Not from the patent,* for this instrument not only does not support their position, but upon its face is conclusive against their claim; but

Third. From alleged presumptions from the mere fact of execution of the latter instrument, which presumptions are directly contrary to the facts in the case, are annihilative of the expressed intent of Congress, and are diametrically opposed to the language of the instrument itself.

Let us now proceed to consider the situation more in detail.

POINT VII.

An analysis of the nature of a land patent.

We desire to point out—

A. A patent partakes to some extent of the characteristics both of a deed and of the record evidence of a judgment.

B. The act of issuing it is a ministerial act.
Wurts v. *Hordy*, 178 U. S., at p. 212.
Stoddard v. *Chambers*, 2 How., 317.

C. The patent should issue as the result of a judgment of the Land Department.
Steel v. *Smelting Co.*, 106 U. S., 447.

It has been called the record evidence of the judgment of the Land Department.
U. S. v. *Winona*, 67 Fed. Rep., 956.

D. The power of the Land Department to issue a patent must be based upon statute.

E. As a matter of fact we believe that under the language of the grant and the joint resolution the patent in this case should be considered merely as a confirmation of the grant. If so considered no argument is necessary to show that it cannot operate to enlarge the provisions of the grant, which, of course, does not give the railroad any title to mineral lands.

Let us examine separately the effect of the patent in question considered, first, as a conveyance, and secondly, as the record of a judgment of the Land Department.

POINT VIII.

If the Patent be considered simply as a conveyance of title,—or, more accurately, as a confirmation or record of the title passed by the Congressional grants,—it is impossible for the appellees to claim that any title to mineral lands passed thereby.

Deeds and grants containing reservations of this nature between private individuals are matters of every day occurrence, and in all such cases it is clearly established that no title passes to lands or rights expressly excepted and excluded from what would otherwise be the operation of the conveyance.

> "The effect of an exception in a grant in respect to the thing excepted is as though it had never been included in the deed."
>
> *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S., 586 at p. 604.

See other cases cited p. 283 of our principal brief.

This doctrine was expressly recognized as applicable to railway land grants in *Barden* v. *The Northern Pacific Railroad Company*, (154 U. S., 288) in which the Court said:

> "Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein, and yet the reverse is the experience of every day. The granting of lands, *either by the Government or individuals*, with a reservation of certain quarries therein, as of marble, or granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time

> by the grantee, in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the Government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed. And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any several products thereof, whether minerals or quarries contained therein, and whether known or unknown." (p. 314).

Title to reserved lands did not pass (p. 315).

The grant must be construed in favor of the Government (*id.*, p. 325).

Soderburg v. *R. R.*, 188 U. S., 526.

Moreover, the burden lies upon the appellees to affirmatively show that any parcel of land claimed by them under the patent was not within the exception.

> "There is a general rule applicable both to the conveyances and statutes that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must, in pleading, state the general clause together with the exception, *and must also show by the testimony that he is not within the exception.*"
>
> *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S., 604.

So, far therefore, as the effect of the patent, considered as a conveyance or confirmation of grant, is concerned, it is submitted to be entirely clear—

(*a*) That the United States had full and perfect power to except mineral lands from the original grant, *and that this was done;*

(*b*) That the patent, considered as a confirmation, *could not* have exceeded the authority conferred by the grant,

M. K. & P. R. R. v. *K. P. R. R.*, 97 U. S., 491,
R. R. v. *Baldwin*, 103 U. S., 426,

irrespective of the time when the title granted became vested in the grantee, and that the patent *did not* even purport to do so;

(*c*) That the exception in the grant and in the confirmatory patent operated to prevent the grantee from acquiring title to any mineral lands included in the general tract;

(*d*) That this is true whether or not either the grantor or grantee knew at the time the location or extent of the mineral lands in question;

(*e*) That the attempt to draw a distinction between exceptions of *minerals*, on the one hand, and *mineral lands*, on the other, is futile and baseless.

(*f*) *That the burden lies upon the grantee when its title is attacked to show that these lands were not within the excepted class.*

(*g*) That the grantee, having accepted the grant containing this exception, is, of course, absolutely bound and estopped by it—that is to say, unless it can advance some theory superior to the rules governing real estate grants and conveyances, in support of its claim. Such a theory is supposed to exist, based upon the idea that the patent is the record of a judgment of the Land Department—and this theory we will now consider.

POINT IX.

If the Patent be considered as in the nature of a record of judgment, it is likewise inoperative to give to the appellees any greater rights than those intended to pass by the terms of the Congressional grant.

The arguments of the appellees upon this branch of the case are:

(A) That Congress vested the Land Department with the power and duty to determine, once and for all time, whether any lands described were mineral.

(B) That it must be conclusively presumed from the fact that a patent was issued that the Land Department had adjudged all of the lands contained within the four hundred and forty thousand odd acres to be non-mineral lands. In other words, that the patent presumes both jurisdiction and the due exercise thereof. Their position tacitly, if not expressly, admits that their salvation depends, *not upon the patent,* but upon presumptions supposed to arise from the issuance of the patent that certain things had been done before the patent issued.

(C) That this is true, notwithstanding the express exception of "all mineral lands."

(D) That the exception last quoted must be considered superfluous and beyond the power of the Land Department to insert, leaving in full force the alleged conclusive presumption first above mentioned.

(E) That the appellant is endeavoring to maintain a collateral attack upon the patent, and that for reasons claimed to be applicable to judgments such a collateral attack is prohibited.

In considering this argument we will inquire—

I. Whether the Land Department was vested with any jurisdiction over these lands?

II. Whether any collateral attack whatsoever upon the patent is involved in this suit?

III. If the patent be considered to be in the nature of a judgment of the Land Department, is that judgment the judgment of a tribunal of general or of special jurisdiction?

IV. Considered as a judgment of a court of special jurisdiction, is it entitled to the benefit of any presumptions whatsoever which will protect it against collateral attack—if this action be construed as a collateral attack?

V. If considered as a judgment of a tribunal of general jurisdiction, is it protected against collateral attack—if this be collateral attack?

We will take up these various points separately.

I. *It is, to say the least, doubtful whether Congress ever vested in the Land Department any jurisdiction to ascertain the quality of these lands as mineral or non-mineral.*

Under the language of the *Barden* opinion, such jurisdiction *was* conferred. See also *Lake Super. Canal Co.* v. *Cunningham*, 155 U. S., 375; *Toltec Ranch Co.* v. *Cook*, 191 U. S., 541.

It is, however, argued with much force in the brief presented in this Court by counsel for the appellant Lamprecht, that this part of the *Barden*

opinion should be regarded as a dictum,—that the Congressional grants made the issue of a patent mandatory upon the completion of each section of road and receipt of the Commissioners' report thereon (§ 4)—that the decisions relating to patents issued under *general laws* have no application to this particular act, inasmuch as a patent in this case was merely confirmatory of a *title already passed* (except as to reserved lands), whereas under general laws no title would pass without a patent—that no provision was made in this statute for any investigation by the Land Department concerning the nature of the lands—and that it was expressly contemplated that the exception of mineral lands should be protected, not by any decision of the Department but by an express clause of the patent, as was actually done.

This point has been presented by counsel so fully that it will only be enumerated here for completeness' sake. Moreover, in our view of the case *the patent was certainly inoperative* as to these lands for reasons we shall shortly give, *whether or not Congress intended that the Land Department should have anything to do with the ascertainment of the non-mineral quality* of lands to be included in the patent.

We cannot, however, refrain from observing that the existence of this *doubt* as to the very jurisdiction itself of the Department should in our opinion *be taken as emphasizing the danger of lightly relying upon any presumption or assumption* that a jurisdiction which the Department itself, in the express language of the patent, shows that it did not even assume or purport to exercise, was as a matter of fact, exercised by it with a result annihilative of its own express declaration, and absolutely subversive of the clear intent of the Congressional enactments upon which the entire matter depends.

II. *The present action does not involve any collateral attack (within the proper meaning of the term) upon the patent in question.*

It is true that the lands claimed by us were included among the lands described in the patents.

It is true that these lands were known mineral lands at the time the patent was granted.

It is true that the Land Department had no jurisdiction, as we shall shortly show, to issue a patent even purporting to cover known mineral lands.

But it is also true that the Land Department *did not attempt to assert that any of the lands described were non-mineral lands, but expressly excluded and excepted "all mineral lands,"* which term this Court in the Barden case has construed to cover both known and unknown lands.

Hence, instead of attacking the patent collaterally either as referring to known or unknown mineral lands, we are simply asserting that it should be construed as an entirety in the light not merely of a part, but of the whole, of its provisions, and that, as thus construed, it affirmatively shows that it was never the intention of the Department to attempt to convey the title to any mineral lands, whether known or unknown at the time the patent was issued.

The question is, perhaps, somewhat confused by the use of the words "void" and "voidable." The exact word descriptive of the relation that this patent bears to these lands is *"inoperative."* The effect of the exception as applied to lands described, is, that if they were in fact, mineral, *the title to them never passed* at all. It is as though they had been omitted originally from the instrument (Point VIII, *supra*). In other words, if a deed conveys to me the Manor of Dale, it should not perhaps be called *"void"* with reference to its effect upon the title to the Fief of Fairlie—it simply is

ineffective according to its own terms. And so, in the present case.

As pointed out in our principal brief, so far as this patent is attacked at all, such attack is being made not by the appellants, but by the appellees, who seek to disregard one of its most material provisions and thereby to give the instrument an effect which is the diametrical opposite of that which it was intended to possess.

III. *If the patent be considered as evidence of a judgment, such judgment was rendered by a Court of special and limited, and not of general jurisdiction.*

> "Its judgment (the judgment of the Land Department) upon these matters is that of a *special tribunal.*"
>
> *Steel* v. *Smelting Company,* 106 U. S., at p. 450.
>
> *Smelting Co.* v. *Kemp,* 104 U. S., 641.

See

> *Barden* v. *Northern Pacific R. R.,* 154 U. S., at p. 328.
>
> Black on Judgments, Sec. 283, 11 Cyc., p. 772.
>
> Bailey on Jurisdiction, Sec. 124.
>
> XVII Am. & Eng. Cyc. Law, 1084.

IV. *The Land Department being, therefore, a tribunal of special jurisdiction (if, indeed, it possessed any jurisdiction at all in the premises), the patent, if considered as the record evidence of its judgment, must comply with the universal rule governing the records of such special and limited tribunals and must (at least unless extrinsic evidence of jurisdiction be produced) affirmatively show upon its face the facts necessary to give the tribunal jurisdiction of the matter purporting to have been decided by it. No presumption of jurisdiction exists.*

The Court will notice that we are not now arguing the question as to whether *we* have the right to show that *no* jurisdiction existed.

On the contrary we assert that the *appellees*, claiming that the tribunal acted within its jurisdiction, *are bound*, in support of their claim, *to affirmatively show* upon the face of the record (or perhaps by extrinsic evidence) *that such jurisdiction existed.*

In support of this proposition we will only attempt to refer the Court to a few of the many authorities which exist.

> "The record of their proceedings must affirmatively show compliance with the statutory requirements, and that as to such matters favorable presumptions will not be indulged in."
>
> Bailey on Jurisdiction, Sec. 124 (?9)

> "This presumption is not exercised in relation to the jurisdiction of a Court inferior or limited, but its jurisdiction must appear or be shown."
>
> Bailey on Jurisdiction, Sec. 121, 130, 183.

> "Courts of inferior or limited powers must not only act within the scope of their jurisdiction, *but it must appear on the face of the proceeding that they so acted;* the record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular case, otherwise the judgment may be impeached collaterally. No presumptions are indulged in its support and want of jurisdiction may be shown *aliunde.*"
>
> *Black on Judgments,* Sec. 282.

> "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments

of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. * * * *The rule is different with respect to courts of special and limited authority;* as to them there is no presumption of law in favor of their jurisdiction; that must *affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face."*

Galpin v. *Page,* 18 Wall., U. S., 350.
Kempe v. *Kennedy,* 5 Cranch, 173.
Thatcher v. *Powell,* 6 Wheat., 119.
Walker v. *Turner,* 9 Wh., 541.
Copley v. *Ball,* 176 Fed. Rep., 689.
I Black, Judgments, 431-434.
Grignon v. *Astor,* 2 How., 319.
XVII Am. & Eng. Enc. Law, 1082, Appellants' pr. brief, p. 303, and cases.

This rule appiies even to a court of general jurisdiction, acting under special and limited power.

"Where the special powers conferred (*i. e.,* upon the Court), are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. *The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."*

Galpin v. *Page* (*supra*).

See

Seccombe v. *R. R.,* 23 Wall., 108.

Judgments of courts of special jurisdiction are absolute nullities if want of jurisdiction in fact exists.

Bailey on Jurisdiction, § 173.

Many authorities declare that unless jurisdiction affirmatively appears from the face of the record, it cannot be shown by extrinsic evidence. In this case it is not made to appear in either manner. *Moreover if it were attempted to show by extrinsic evidence that the Department had actually determined that the lands were non-mineral, such evidence would contradict the express language of the mineral exception in the record and could not be admitted.*

The general rules above quoted are directly applicable to Land Department patents, considered as records of judgments given by the Land Department.

a. The Land Department never has had any jurisdiction to make grants "in defiance of the will of Congress" of lands which have been expressly reserved by Congress for other purposes. *Any such attempt is void and inoperative.*

Burfenning v. *R. R.*, 163 U. S., 319.
Black on Judgments;
Johnson v. *Drew*, 171 U. S., 100.
Smelting Co. v. *Kemp*, 104 U. S., 636.
Steel v. *Smelting Co.*, 106 U. S., 447.
Doolan v. *Carr*, 125 U. S., 618.
Reynolds v. *Iron Silver Mining Co.*, 116 U. S., 687.
Northern Pacific R. R. v. *Sanders*, 166 U. S., 620; 171 U. S., 655.
Wright v. *Roseberry*, 121 U. S., 519.

b. The Land Department cannot arbitrarily abrogate the rights of an entryman.

Parsons v. *Venzke,* 168 U. S., 589.
Bank v. *Bladow,* 176 U. S., 453.
Hawley v. *Diller,* 178 U. S., 476.

c. Under this grant it had no jurisdiction to grant mineral lands, whether known or unknown, entered or not, for these were expressly reserved by Congress from the original grant.

Barden v. *Northern Pacific R. R.,* 154 U. S., 288.
U. S. v. *C. P. R. R.,* 84 Fed. Rep., 218.

See

Northern Pacific R. R. v. *Sanders,* 166 U. S., 620.

d. In the present case, the jurisdiction of the Land Department (if it existed at all) was strictly limited by the Joint Resolution of 1870, which provided that—

> "it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company for the sections of land coterminus to each constructed section reported on as aforesaid to the extent and amount granted to said Company by the said act of July 27th, 1866, *expressly saving and reserving* all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866" (Bill of Complaint, Sec. 8).

The conditions and restrictions referred to have reference to lands of which—

> "the United States have full title not reserved, sold, granted or other appropriated and free from preemption or other claims or rights * * * provided further that all mineral lands be and the same are hereby

excluded from the operations of this act" (Bill of Complaint, Sec. 6).

e. Of course, if the Land Department had power to classify these lands, it could decide *pursuant to due proceedings,* whether in any given case a parcel of unknown land fell within the class covered by the foreging exceptions; and similarly, *pursuant to due proceedings,* it might authorize the passing of title to unknown land which really was mineral but which had been erroneously decided after an investigation and hearing, to be non-mineral.

For inferior courts whose jurisdiction depends on the existence of certain facts may sometimes by adjudicating the existence of these facts thus acquire jurisdiction that would not otherwise exist.

Bailey on Jurisdiction, § 129-130.
Smelting Co. v. *Kemp.,* 104 U. S., 641.
Kent v. *Canal Co.,* 144 U. S., 75.
Phelps v. *Mutual Ex.,* 112 Fed. Rep., 45.

f. But the point which we wish to make clear is that the only basis upon which IN ANY POSSIBLE EVENT it can be claimed that the Land Department had or acquired jurisdiction to transfer a title to land which, as a matter of fact, was not within its primary power to transfer, is the basis of an actual decision rendered after due proceedings by the Land Department to the effect that the land in question was non-mineral land. Even this basis would not justify a patent of known mineral land.

If it appears *upon the face of the record* that such a decision has been made pursuant to proceedings duly had, then, unless attacked directly for fraud or otherwise, it might (except as suggested in Subd. I of this Point) be binding against the world and be a sufficient proof of the jurisdiction of the Department to execute a patent upon such land.

And perhaps (which we do not concede) if it can be shown affirmatively by evidence *outside of the record, and which does not contradict the record*, that such due proceedings leading up to such a decision were had, the result might be the same.

But where (1) there is no such decision upon the face of the record, and where (2) there is no evidence of any such proceedings or decision outside of the record, and where (3) there is in no possible event any jurisdiction on the part of the tribunal to act in the absence of such a proceeding or decision, we submit that it is entirely clear that the patent, itself purporting to transfer title to certain lands without classifying them as non-mineral lands, without deciding that they are non-mineral lands, without reciting that proceedings had been taken to determine whether or not they were non-mineral lands, whose only recitals do not even touch the point, and, lastly, containing upon its face the express reservation of *"all mineral lands"—thus showing affirmatively that no such decision had ever been rendered*—cannot possibly give rise to any presumptions of a jurisdiction which not only was not affirmatively shown, but, on the contrary, which was affirmatively shown not to have been claimed to exist; and that the patent itself is a nullity so far as it may be claimed to be the basis of a title to lands which the Department primarily had no power to grant and which it could only obtain power to grant, if ever, by a decision that, as a matter of fact, they were non-mineral lands.

The position of the appellees is based upon grounds which are *exactly the opposite* of those established by the authorities. They claim that we must show an affirmative decision that the lands were mineral in order to rebut an alleged presumption to the contrary. But the authorities make it clear, we submit, that, whether the patent be considered as a deed or as the record of a judg-

ment, *the burden is upon the appellees to affirmatively show* that the lands were decided to be non-mineral in quality. This burden they cannot sustain.

g. Let us examine in this connection the language of the decisions of this Court as to what a patent must contain (Appellant's Pr. Brief, p. 315).

Upon so doing it will be found that the Court has made clear the necessity that the patent itself show the existence of the jurisdictional facts.

> "The fact remains that under the law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title of the Government to the grantees,* reposes in officers of the Land Department. Until such patent is issued, *defining the character of the land granted and showing that it is non-mineral,* it will not comply with the Act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral land; but a patent *issued in proper form upon a judgment rendered* after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, *that the lands were non-mineral,* would * * * be conclusive."
>
> *Barden* v. *The Northern Pacific Co.,* 154 U. S., at p. 330 *et seq.*

See

> *Davis* v. *Weibbold,* 139 U. S., 526.
>
> *Deffebach* v. *Hawke,* 115 U. S., 406.

> "It can issue to the rightful claimant the patent provided by law, *specifying that the lands are of the character for which a patent is authorized.*"
>
> *Barden* v. *N. P. R. R.,* p. 327.

IN OTHER WORDS, THIS COURT HAS APPLIED TO PATENTS THE GENERAL PRINCIPLES ABOVE INVOKED.

Not only must there be a decision, but it must appear that the decision has been made pursuant to due proceedings. In other words—

> "*after a due examination* of the subject by officers of the Land Department."
>
> *Barden* v. *Northern Pacific Co.*, p. 331.

And it must be expressly noted that the due examination to which the Court alludes does not mean that the duties of the land officers can be performed by the mere acceptance of selections made by the claimant or of the listing of such selections.

> "The Act of Congress does not provide that the selections of the lands by the plaintiff, as a part of its grant, shall in any respect change its purport and effect and eliminate any of its reservations; nor does it empower the officers of the local land office to accept the list as conclusive with respect to such grant in any particular."
>
> *Id.*, p. 321.

It should be noted here, that whatever the amount or nature of the testimony that may be taken, *there must in any event, be a decision.* No possible preliminary proceedings can validate the patent as to these lands, *if they were not in fact decided to be non-mineral.*

h. If, as is the case, the foregoing rules apply in any case where patents are issued, how much more strictly should they apply in the present case where the limitations of any jurisdiction that may be held to exist were emphasized by the terms of the joint resolution of 1870 stating that—

> "it shall be the duty of the said Secretary of the Interior to cause patents to be issued

> * * * *expressly saving and reserving* all the rights of actual settlers together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866" (Bill of Complaint, Sec. 8).

It may be well contended that the foregoing language constitutes a direction to the Secretary of the Interior to *insert in the patent* to the grantee an express reservation of these various points, including the mineral exception. *This was the only way to assure perfect protection to the U. S. provided the grantee was willing to accept the patent in that form.*

But whether or not it should be thus construed, one thing is submitted by us to be certain, and that is *that if the Land Department* had any jurisdiction to ascertain the quality of the lands, it was *certainly made its duty to protect these reservations EITHER by the language of the patent OR by a proper proceeding, investigation and determination.*

And where the patent, as in the case at bar, fails to show upon its face that any steps whatsoever (other than the mere listing of the lands, Appellant's Pr. Brief, p. 417), have been taken by the Land Department or the claimant to comply with the mandatory provisions of the joint resolution and with the general limitations of the original grant, and where no extrinsic evidence is produced showing such compliance, we feel entirely safe in submitting that no presumptions whatsoever can be resorted to to give the patent a force which it would not otherwise possess.

No classification of the lands as non-mineral appears in the patent.

Had such a classification appeared, based simply upon the recitals, the latter would have been absolutely insufficient to support the classification. They refer solely to the construction of the road,

the listing of the lands, and their location as coterminous with the road, and are absolutely silent as to any steps taken to determine their non-mineral quality. Hence such an attempted decision or classification being based upon insufficient evidence would be always attackable (Cases *infra*). No other evidence than as recited will be presumed to have been taken.

Galpin v. *Page,* 18 Wall, 350, and cases cited Subd. V. of this point.

And the express language of the mineral exception in the patent, so frequently hereinbefore quoted—

> "yet excluding and excepting *all mineral lands* should any such be found in the tracts aforesaid"

places the question, it is submitted, at rest and affirmatively demonstrates the non existence of any of the proceedings or of the vital decision which the appellees claim must, from the mere issuance of the patent, be presumed to exist, and the necessity for which was emphasized by the language of the joint resolution above quoted.

To summarize:

(*j*) The jurisdiction of the Land Department (if it possessed any jurisdiction at all in this case) to grant as non-mineral, lands which in fact were mineral, is in any event subject to the following principles:

(1) If the lands were known to be mineral, no decision that they were not mineral could possibly affect the situation. The very word "known" assumes a situation which the Land Department could not overturn by a decision to the contrary.

U. S. v. *C. P. R. R.,* 84 Fed. Rep., 218.

The lands were *restricted* from grant (*Smelting Co.* v. *Kemp,* 104 U. S., 671). If such a decision were attempted, we believe that it would simply be a decision of law upon insufficient evidence, and as such always subject to attack.

N. P. R. R. v. *Colburn*, 164 U. S., 385;
Hawley v. *Diller,* 178 U. S., 489;
Appellant's principal brief, p. 16 *et seq.*

(2) In the case of lands not known to be mineral, but which in fact were mineral, the Department had power to investigate and take testimony upon due notice to all previous locators and upon compliance with the reasonable rules of the Department. If after such proceedings they did reach a decision that the lands were in fact non-mineral and if those proceedings and that decision were recited in the patent, it might be conclusive. *Certainly no less than this is imperative in the case of known mineral lands.*

(3) But no such decision could be made arbitrarily and without notice to prior entrymen, whose rights could not be arbitrarily cancelled.

(Cases *supra*).

(4) Nor would such a decision be valid as giving jurisdiction unless the proceedings were had in accordance with the established rules of the Department as to notice and investigation and unless these rules were reasonable, appropriate and within the law.

XXVI Am. & Eng. Enc. Law, p. 379.
See *Leonard* v. *Lennox,* 101 Fed. Rep., 764.
Appellant's Pr. Br., p. 301.
Black on Judgments, § 530.
Puget Mill Co. v. *Brown,* 54 Fed. Rep., 987; affd. 59 , 35.
32 Cyc., 1025.

Of these rules this Court takes judicial notice.

Caha v. *U. S.*, 152 U. S., 211.

Leonard *v.* Lennox, 101 Fed. Rep., 764.

They were not followed in this case (Appellant Pr. Brief, pp. 97, 160, 286-8).

(5) Such decision (as well as the taking of due and proper proceedings) should have been set forth in the record itself, to wit: in the patent.

Barden v. *The Northern Pacific R. R.*, 154 U. S., p. 288.

(6) As these record requirements were not complied with, and as no extrinsic evidence of such compliance was produced, there is absolutely no proof or presumption that the Land Department had or acquired jurisdiction to convey, in hostility to and defiance of the Congressional enactment, lands which are, in fact, mineral.

V. *If the patent be considered as the record of a judgment of a tribunal of general jurisdiction, is it protected against collateral attack—if this action be a collateral attack?*

Needless to say we intend to consider this point without in any way waiving the propositions above advanced.

(*a*) We do not need to consider the mass of authorities relating to presumptions of jurisdiction of tribunals of general powers or to collateral attacks upon ordinary judgments of such tribunals, although we take it that in any case we may attack such a judgment for lack of jurisdiction.

Williamson v. *Berry*, 8 How., 540.

Old Wayne Assn. v. *McDonough*, 204 U. S., 16.

(*b*) For in this case the lack of jurisdiction *appears affirmatively* upon the face of the so-called judgment itself.

(*c*) *If* the Land Department were a tribunal of general jurisdiction and *if* this patent had contained no mineral exception, it might possibly be claimed to be conclusive against all the world. This point we do not concede, and shall not argue. But in this case, the mineral exception appearing as it does upon the very face of the record shows that the Land Office never intended to convey mineral lands and never even purported to have decided that the lands described were not mineral lands.

(*d*) And since, as we have already shown, the only way (if any) in which the Department could acquire jurisdiction to convey as non-mineral, lands which really were mineral, was by an actual decision, after due proceedings had, that the lands were non-mineral, it follows that where it affirmatively appears upon the record that no such decision was rendered, any possible presumption which otherwise might exist is negatived.

(*e*) In other words, whether or not the judgment might have been considered *res adjudicata* against collateral attack upon this point if the record had been silent, yet where the record affirmatively discloses that this point—*the essential point relating to jurisdiction*—had not only not been decided but had been expressly reserved from decision, all presumptions fall.

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts *concerning which the record is silent.* Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consider-

ation when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it * * * will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

Galpin v. *Page,* 18 Wall., 350.

See also *Settlemier* v. *Sullivan,* 97 U. S., 444.

Butterfield v. *Miller,* 195 Fed. Rep., 203.

Ritchie v. *Sayres,* 100 Fed., 520.

Guaranty Trust Co. v. *Green Cove Co.,* 139 U. S., 137.

Bailey on Jurisdiction, § 137.

See cases cited in Appellant's Principal Brief, pp. 72 to 101, and p. 59.

"Where a judgment or decree expressly excepts or reserves from its operation specified rights or claims of the parties in suit or the decision of questions in issue, or the right to take further proceedings in respect to certain matters, it constitutes no bar to a subsequent action on the matters so reserved; but on the contrary the reservation itself becomes *res adjudicata* and prevents the raising of any question as to the right to bring or maintain such subsequent suit."

23 Cyc., page 1145.

"The notice and return, appearing of record in the proceedings for divorce, control the general recital in the decree that due service had been made upon the defendant therein."

Cheely v. *Clayton,* 110 U. S., 701.

"When a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption (i.

e., of jurisdiction) cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting".

Old Wayne Life Assn. v. *McDonough*, 204 U. S., 16.

"Counsel invoke the presumption in favor of the regularity of the proceedings of a court of general jurisdiction which protects its decrees against collateral attack where its record is silent regarding alleged defects, but there is no room for presumptions where the crucial facts appear upon the face of the record, and this presumption does not arise where the record itself discloses a fatal lack of jurisdiction. * * * The decree * * is therefore void on its face, both against direct and against collateral attack, and it must be disregarded."

Indiana Lumber etc. Co. v. *Brinkley*, 164 Fed. Rep., 968, and cases cited.

Kempe v. *Kennedy*, 5 Cranch. 185 (Marshall, *C. J.*)

"If the judgment itself does not show what matters were litigated and decided, the fact may be shown from other parts of the record or by competent evidence, although the estoppel cannot be extended to matters which the judgment expressly declares not to have been in issue in the action in which it was rendered, *or to have been omitted from consideration therein.*"

23 Cyc., page 1292.

The foregoing proposition is submitted to be true whether the judgment be taken as a judgment *in personam* or a judgment *in rem* or a judgment *quasi in rem*. In no case can it be said to be in any way a binding decision as to a point which it expressly shows upon its face that it did not decide.

And since the absence of decision of this point rendered the patent nugatory as to lands in fact

mineral, it follows that it was a wholly inoperative instrument to transfer title to such lands.

In other words, the patent does not protect the appellees either expressly or by presumption, and this whether it be considered as a deed or as the record of a judgment.

Merely because a so-called patent has been signed, sealed and delivered, it cannot be said to possess any peculiar sanctity. It may be a valid instrument—it may be worthless. Of two patents issued to different grantees for the same parcel of land, as sometimes happens, one is worthless, though both are executed with the same formalities. In every case, its value depends upon the attending facts and circumstances either as set forth in the instrument itself or as shown *aliunde*. *In no case*—even under the construction most favorable to the patentee—*can such an instrument be given greater force and effect than would be possessed by the judgment of any tribunal of special and limited jurisdiction.* And yet the contention of the appellees would place it upon a unique pedestal of prestige and authority—superior to the most formal and careful conveyance—outranking the most solemn judgments of courts of widest jurisdiction.

For such a contention, and especially with such results as would follow its adoption in this case, it is submitted that neither reason, expediency, sound morals nor authority furnish adequate support.

Having thus reviewed the legal situation in detail, we sum up the relations between the parties, in their wider bearings, thus:

(*a*) The title to the mineral lands remained in the United States.

(*b*) Appellant and others have made mineral locations on these mineral lands, as permitted by Federal and local law.

(*c*) The Railroad has good title to the non-mineral lands, and no title whatever to the mineral lands.

(*d*) The mineral locators thus are neither intruders nor trespassers, but are entitled to their mineral claims lawfully and in good conscience.

(*e*) The Railroad's endeavor, in spite of the Act, the Joint Resolution and the clear exception in the patent, to take unto itself these mineral lands is dishonorable, immoral and conscienceless.

POINT X.

In opposition to the foregoing considerations the appellees place great stress upon the claims that the mineral exception in the patent was absolutely void and inoperative, that the Land Department had no power whatever to insert it in the patent in question, and that in any event the exception does not indicate a failure on the part of the Department to decide upon the quality of the lands.

Their entire argument is contained in Judge Ross's opinion in the Roberts case (a case in which the bill alleged expressly that title to the lands had passed to the patentee), in which he held that the decision in *Shaw* vs. *Kellogg*, 170 U. S., 313, was a direct authority for the proposition that the officers

of the Land Department had no authority to insert in the patent under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid."

In addition to *Shaw* vs. *Kellogg*, special reliance is placed upon *Cowell* vs. *Lammers*, decided by Judge Sawyer in 21 Fed. Rep.. 200; *Francœur* vs. *Newhouse*, 40 Fed. Rep., 621, and a ruling by Secretary Hitchcock, 32 L. D., 342, etc. All of these decisions are considered at length in our principal prief (p. 147 *et seq.*). It is not our intention to repeat these arguments in detail, but we desire to summarize them as follows:

A. As to *Cowell* vs. *Lammers*, and *Francœur* vs. *Newhouse*, they were both decided at Circuit and by the same judge.

Both were based upon the theory that the railroad land grants covered all lands except mineral lands that were *known to be such at the time of the grant.* Upon this theory the Court appears to have held that a broad exception of all mineral lands would limit the grant, by attempting to reserve not merely known lands but unknown lands as well. Incidentally the rights of these parties were involved.

This fundamental theory upon which the decision depends was annihilated in the case of *Barden* vs. *The Northern Pacific R. R.*, 154 U. S., page 288 *et seq.*, in which this Court settled for all time the proposition that railroad land grants excepted both *known and unknown* mineral lands.

Hence the reservation contained in the mineral exception *did not limit the grant* but carried it into effect, and the entire reason for the earlier decisions failed.

B. As to the ruling of Secretary Hitchcock in 1904, we call attention to the fact, (1) that for thirty-seven years prior to that time it had been the uniform practice of the Department to insert the mineral exception; (2) that this was changed by an

ex parte ruling of the Secretary upon an application made by the Northern Pacific Railroad Company; (3) that this ruling was itself overruled in 1911 and that from that time until the present day the uniform practice of the Department is as it was formerly, to insert the mineral exception. Hence this department ruling has been itself overruled. This practical construction of the law by the Land Office is entitled to much weight (Appellant's Pr. Brief, p. 397).

C. *Shaw* vs. *Kellogg, supra*, is, we submit, manifestly inapplicable to the present case for the following reasons:

(1) The statute expressly directed the Surveyor General of New Mexico to make survey and location of the land selected, " thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select " (p. 342).

(2) No provision for lieu lands was made.

(3) The grant was so framed that if any part of the lands were mineral, the title to the entire selections would fall.

(4) The grantees' selection was actually approved by the Surveyor General (p. 342).

(5) The Land Department approved the action of the Surveyor General (p. 343).

(6) Hence there existed in that case the great element which does not exist in this case, to wit: an *actual decision* of the Land Department to the effect that the lands were non-mineral.

(7) The case arose under what was known as the Baca Grant, which was expressly construed by the Court as only excluding lands " which were then *known* to contain mineral " and which allowed a limited time to make the selection (p. 332). This is exactly the opposite of the situation in the grant now

under construction, which has been construed to exclude both known and unknown mineral lands.

(8) In the next place the grant in question did not require or permit a patent to be issued. Title passed at the time of the "approved survey and location" (p. 382). No instrument was therefore executed and delivered to the grantee *and accepted and recorded by him*. In other words, *no question of estoppel arose*.

(9) Lastly, title having passed to the grantee, pursuant to a *valid decision* of the Land Department that the grantee was entitled to the lands in question, it was of course manifestly impossible for a subsequent locator, for the first time, to raise the question thirty-four years thereafter, and his claim that the Burden case applied was, of course, fully met by the fact that in the Burden case a patent was required, whereas in the Shaw case no patent was permitted.

The appellees urge most vigorously that the Shaw case establishes the proposition that "it was its (i. e. the Land Department's) duty to decide the question, a duty which it could not avoid or evade."

With this general proposition we have no quarrel. This language, however, must be read in connection with the express finding of the Court *that there was a decision* by the Surveyor General "that the land was non-mineral" (p. 337), and that this decision was accepted by the Land Department. In other words, the Department *did decide* the question in the Shaw case.

And although at the time the patent now in question was issued it was open to the Railroad Company to urge that the Department *ought to have decided* this particular question, to wit:—as to the quality of the lands purporting to be covered by the patent, yet, as a matter of fact, *they did not decide* that question. Whether or not they did their duty,

is now immaterial. *No decision was, as a matter of fact, rendered on this point.* Manifestly, affirmative proof *of no decision cannot be deemed equivalent to an actual favorable decision;* at best it can be only deemed equivalent to a refusal to take any action whatsoever on this point—and that is exactly what was done.

If the officers of the Land Department fail to do their duty, can this failure be relied upon by the appellees as a sufficient ground for taking away from the United States the title to this valuable property? The default, if any, on the part of the officers of the Land Department was known to the appellees. The patent, if it was in improper form and issued in the absence of the necessary decision, *was accepted by the appellees* in that form and with knowledge of the absence of this decision. The claim that under these circumstances the rights of the United States to this territory have been validly foreclosed is a claim which we believe to be against good conscience.

As against the authorities above discussed our principal brief shows:

(1) The uniform practice of the Land Department, except during the period above specified.

(2) The uniform current of the California and other State cases cited in our principal brief (p. 134 *et seq.*), and the language of this Court in such cases as *Reynolds* v. *Ir. S. Min. Co.* (116 U. S., 687), and *Moran* v. *Horsky* (178 U S., 211).

(3) The decision in the Barden case already fully considered, and never overruled (see p. 331), and the decision of Judge Bean in *East. Or. Land Co.* v. *Willow River, &c.*, reversed by the Circuit Court of Appeals on grounds stated in our Supplemental Brief, page 30.

(4) The fact that in the present case the exception did not limit the congressional grant but carried

it into effect, thus rendering *Davis* v. *Weibbold* and *Diffebuck* v. *Hawks* inapplicable.

(5) The fact that the Joint Resolution of 1870 expressly required that the restriction as to non-mineral lands and all other conditions and restrictions should be saved—which could only be done by express language in the patent or by a full examination of the facts and express adjudication as to the nature of the lands—which latter alternative was not adopted.

(6) The uniform current of the authorities upon the general subjects of the effect of the patent as a deed and as record of a judgment hereinbefore considered.

(7) The absence of any decision, either shown by the patent itself or by outside proof, which is in any degree inconsistent with the apparent intent of the Land Department to leave the question of the quality of the land open and unsettled. Had such a clearly inconsistent finding been made, it might have been held controlling, and the mineral exception repugnant. But in its absence, the actual intention of the Land Office not to make any such decision is made clear beyond peradventure by the language of the exception.

Whether or not the Department can validly insert the mineral exception in cases where actual decisions *contra* are rendered; *it certainly had power where no decision was rendered, to so state in the patent. And this is exactly what the mineral exception accomplishes in this case.*

(8) Lastly, the enormous strength of the moral position of the appellant, who is seeking, partly by reliance on the mineral exception, to carry into effect just what Congress intended to effect, as compared with the position of the appellees, who, repudiating the exception, are seeking to annihilate that intent, to their own unfair advantage.

We will briefly notice the point made in the appellant's brief to the effect that the mineral exception does not repel the alleged presumption of decision of the quality of the lands claimed to flow from the issue of the patent.

The point is submitted to be untenable.

In the first place, *no presumption flowed from the patent* as to the jurisdictional question of whether the lands were or were not determined to be non-mineral lands.

In the second place, if, under any circumstances, such an assumption would have existed in the absence of the mineral clause, it certainly cannot exist as against the force of the mineral exception.

The presumption, if it exists at all, is a presumption that the department had definitely decided that the lands were non-mineral lands; but if such a decision had been made by them after the investigation contemplated by the law, it is inconceivable that they would have immediately stultified their own judicial determination by a clause which left the entire question open for further consideration and determination.

If a Court, in adjudging a number of issues, expressly leaves for future determination the question whether A owes B $100, how absurd it would be to *assume that this Court had already actually decided this debt to be due.* Yet such is the claim of the appellees. But the words of futurity in the exception expressly repel any idea of action taken in the past.

POINT XI.

The effect of the acceptance and recording of the patent by the grantee.

This point has been fully considered in our principal brief (pp. 375 *et seq.*) and in our supplemental

brief, and has also been alluded to in the foregoing argument.

We desire, however, to now summarize our views upon this point as follows:

(1) The appellees could not have been compelled to accept the patent if, as a matter of fact, it was improper in form.

Leroy v. *Jamison*, 3 Sawyer, 369,—opinion of Fields, *J.*

United States v. *Schurz*, 102 U. S., 399.

Cowell v. *Colorado Springs Co.*, 106 U. S., 55.

(2) If tendered to them in an improper form they could have refused to take it and have insisted upon its correction, In other words, if the Land Department had any jurisdiction in the premises, the grantee could have amply protected itself against the possibility of attack by making due proof that the lands were non-mineral and by insisting that the Land Department should decide accordingly and should record its decision in the patent This proof they refused for two years to make, and hence were compelled to be satisfied with the only kind of patent which the Department, realizing its ignorance of the facts, and possibly in doubt as to having any jurisdiction, was willing to execute.

(3) By taking the patent as it was drawn, however, *in the form best fitted to absolutely protect the United States and to exactly comply with the terms of the grant*, the appellees affirmatively elected to accept it in its entirety and are absolutely estopped from claiming that so far as it is favorable to them it is valid, and so far as it is unfavorable it is void. The instrument must stand or fall as a whole, and all its parts must be read together, and the patentee is bound by the result of such reading.

(4) It is entirely immaterial so far as this is concerned whether or not the patent be considered as a deed or as the record of a judgment.

If the patent be considered to be taken as a deed, there can be no possible question as to the validity of the exception clause, for the reasons given in an earlier part of this brief. If the patent be considered as the record of a judgment, which no motion was made to correct and from which no appeal was taken, but under which the patentee has asserted rights, the same conclusion must follow. For it does not lie in the patentee's mouth to rely on the judgment in part and repudiate it when and as deemed convenient. A judgment, even if erroneous in fact is conclusive in its entirety until corrected. And if void at all it is void in *toto*.

(5) And emphatically is this true where, as in the present case, the patentee for years executed subconveyances to various purchasers, expressly recognizing the mineral exception and embodying it in the terms of its own grants (Appellant's principal brief, pp. 446-9).

(6) In this respect the case differs most emphatically from *Shaw* v. *Kellogg* (*supra*), where no patent was provided for, or issued to or accepted by the patentee.

(7) And if under any possible circumstance there could be any escape from the binding effect of the acceptance of the patent as hereinbefore indicated, it is submitted that no such exception exists in such a case as that disclosed by the certificate, which affirmatively shows that the exception was inserted "with the consent of the defendant Southern Pacific Railroad Company and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in

fact mineral" (Appellant's principal brief, p. 9). It is inconceivable that any theory of law or morals can be devised which can permit the arbitrary repudiation of such an agreement by one of the parties to it.

POINT XII.

As to privity.

(1) Unless our entire argument falls to the ground, it is not necessary for the appellant to show any privity whatsoever between himself and the original mineral locators of the land in question.

Either the title to these lands passed or it did not pass to the patentee.

If it passed, only subject to be avoided by fraud or mistake, &c., the appellant is out of court.

If it did not pass, it remained in the United States subject to such claims as the prior locators may have had, until the moment when the appellant relocated the lands in question, at which time he became the *cestui que trust* for whose benefit the United States held the legal title to these lands.

(2) Despite the foregoing observations, it is nevertheless submitted that if under any conception of the case it should be considered necessary to establish privity between the appellant and the prior locators, such privity exists for reasons which have been set forth at pages 317 *et seq.* of our principal brief.

The essence of the situation seems to us to be that the appellant is not attacking the patent in any way, shape or form, but on the contrary, is standing upon it as written and insisting that in accordance with its exact terms and intent no title ever passed from the United States to the patentee. If this be true, he, as mineral locator, stands in his own right in

a position where he can establish a better title thereto, than that which the appellees may claim. The time of his location is immaterial.

POINT XIII.

As to the Statute of Limitations.

For the reasons set forth in the preceding portions of this brief, no question of the Statute of Limitations can arise, because no attack is being made upon the patent, but it is simply sought, not to be cancelled in whole or in part, but to be interpreted in accordance with its terms in the light of the rules of law applicable thereto, and as so interpreted it passed no title to the patentee to the lands in question.

The Statute of Limitations is not invoived in any of the questions certified to this Court.

Even if the patent be held validated by any Statute of Limitation under the doctrine of *U. S.* v. *Chandler-Dunbar Co.*, 209 U. S., 450, it still would be operative *only in accordance with its express language*, and as an entirety; and would, therefore, convey no title to the premises in question.

POINT XIV.

Appellees' position respecting the function of the Land Department.

At pages 36 and 37 of the Brief for Appellees the following statement is made:

> "While the Interior Department has frequently been described as a special tribunal, or as a quasi-judicial tribunal, *the facts remain that it is, in respect of the issue of patents, a purely administrative body*, and that its act

> in issuing a patent is a mere ministerial function. There is a certainly nothing about the railroad land grants which renders the exercise of the functions of the Department with reference to them any more judicial than the functions which the Department is called upon to exercise under most public land grants, but the contrary rather, and yet it has never been suggested under land laws generally that every fact which the Department is required to determine prior to the issue of a patent must be affirmatively stated in the patent. We do not understand that the rule frequently announced to the effect that the issue of a patent presupposes the existence of all prerequisites to its issuance is derived in any sense from any supposed judicial character of the duty performed by the Department."

The essence of this contention is found in its closing words. Appellees seem to claim that the nature of the duty performed by the Land Department settles the question whether or not the Department has a judicial character in making its decisions in such cases. In this contention there is little with which we have to quarrel. Taking the matter superficially only, this argument would refer the entire question back to the Statute of 1866, which expressly excepted the lands "not mineral." Our whole argument is primarily derived from this reservation in the act, and we should be entirely ready to accept the estimate of the Land Department's function that, at this point in their brief, is apparently satisfactory to appellees.

It is, however, also the fact that the appellees commence their brief (Point I) with the thesis that the issue of a patent under this grant itself involves a *determination* by the Department of the Interior that the lands described therein are non-mineral lands and that the presumption of such a determination is conclusive as against the appellants. The passage above quoted must therefore be taken in a relative sense rather

than at its face value. The appellees would seem to mean that the functions exercised by the Land Department respecting railroad land grants are no more judicial than those which they exercise under most public land grants. The appellees' query would then seem to be, *how judicial* may the functions of the Department be said to be? Without conceding that public land grants and railroad land grants do not present points of dissimilarity, there is apparently in the minds of counsel for the appellees some conception of a *degree* of judicial function, greater or less, exercised in arriving at the "determination." And this determination is based, not upon the nature of the duty performed, but upon the statute under which the duty is directed to be performed. From appellants' point of view it makes very little difference to what extent the function of the Department is judicial or otherwise. The patent is based upon facts, and the nature of such facts is provided by the Act of 1866. If ministerially, judicially or in any other fashion the Land Department had ascertained the existence of the necessary facts, we should not be here to argue the matter. The truth is, however, that no determination of any matters whatever other than to sign, seal and deliver the patent to the railroad company, has ever been reached by the Land Department.

The real inference from the quotation just made from counsel's brief is that appellees repudiate the theory that the Interior Department acted *judicially* in connection with the issuance of this patent.

This repudiation seems to us to be conclusive in our favor.

For if the patent is not the record of a judicial decision, what is it?

If counsel say that it is merely a confirmation of the original grant, they are out of court, for the original grant under no circumstances authorized the transfer of title to mineral lands.

If driven from that position they say that it is a mere conveyance and not in any sense a judicial act, they fare equally badly; for, in the first place, as a conveyance the authority to make it is limited by the terms of the grant, and, in the second place, it did not even purport to exceed the authority created by the grant, for it contained an exception and exclusion of mineral lands, which exception and exclusion pursuant to the *Barden* decision and the other considerations advanced in this brief are absolutely operative to effectually prevent the passage of title to lands which in fact were mineral lands.

And if the patent is neither a judicial record nor a confirmation of the grant nor a conveyance what, again we ask, is it? Is it a mere unclassified and unclassifiable thing governed by its own principles and not dependent upon any general theories of law for its interpretation and support? Manifestly this alternative is too nebulous to think of. As a matter of fact, as we have above shown, a patent possesses the characteristics both of a deed and of the record evidence of a judgment. The latter characteristic is the only one on which appellees could possibly depend; and if, as is the case, they repudiate allegiance to this idea, they deal at the same time a death blow to their entire contention.

POINT XV.

As to appellees' claim that the question involved is not one of jurisdiction.

On pages 38 and 39 of their Brief it is said:

> "In granting the patent in suit the Department clearly had jurisdiction of the subject matter, for such jurisdiction was conferred by the Act of Congress and by the Joint Reso-

lution. These were admittedly public lands, and the Department was authorized to convey them if they were ascertained to be non-mineral lands as to which the United States had full title, free from pre-emption or other claims or rights, etc. The subject matter, therefore, was within the jurisdiction of the Department, and no question of jurisdiction of parties was involved. The identification of the land as non-mineral, or as free from pre-emption and other claim, and as within the twenty-mile limits of the grant, etc., were matters of fact necessarily presented for determination as incidental to the issuance of the patent, which represents the final judgment of the Department. *These matters of fact would not present questions of jurisdiction.*"

In other words, the appellees' position is that the determination of the question of the quality of the lands is covered by the rule which applies to questions of regularity of procedure and not to questions of jurisdiction.

Such a claim as this enables us to directly test the strength of their entire position, for it is absolutely settled by the authorities which we have heretofore cited *that the question is one of jurisdiction and is not one of regularity of procedure.*

The Land Department had no power to transfer mineral lands under the terms of this grant.

Its only jurisdiction to transfer any lands hung upon their being non-mineral lands; and, as we have shown, the only way in which they could gain jurisdiction to transfer lands which as a matter of fact were mineral lands, was by a judicial decision to the effect that the lands in question were non-mineral.

Smelting Co. v. *Kemp*, 104 U. S., 641.
Kent v. *Canal Co.*, 144 U. S., 75.

The determination by the Land Department of this question was absolutely vital to its jurisdiction. If it did not reach such determination, then it had

no jurisdiction to convey lands which as a matter of fact were mineral lands. And the appellees' argument, based as it is upon the theory that its vital and underlying point was one of mere regularity of procedure and not of jurisdiction, is utterly untenable.

POINT XVI.

The application of the foregoing principles of law to the particular questions certified.

If we are correct in the views hereinbefore expressed, the questions certified, Nos. First, Second, Third, Fourth, Sixth and Seventh are readily answered as follows:

I. Question First reads:

> "FIRST: Did the said grants to the Southern Pacific Railroad Company exclude mineral lands which were known to be such at or prior to the date of the patent of July 10th, 1894?"

Answer: Yes. For the following reasons:

1. The Land Department had not acquired and could not acquire jurisdiction to grant such lands.

2. They had previously been located by mineral locators, and the Department had no jurisdiction to arbitrarily annul the entrymen's rights.

3. No jurisdiction was even attempted to be assumed by the Land Department for the reason that it never decided or attempted to decide that the lands in question instead of being known mineral lands were, as a matter of fact, non-mineral, but, on the contrary, the entire matter was left open by the language of the patent itself.

4. Hence the grant in question neither conveyed nor purported to convey known mineral lands.

II. Question Second reads:

> "SECOND: Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?"

Answer: No. For the following reasons:

1. The only way in which title to the lands actually mineral, but supposed to be non-mineral, could be conveyed under the present grant by the Land Department (if under any circumstances the Department had jurisdiction to thus enlarge the grant), was by an investigation duly had upon notice duly given in accordance with reasonable, proper and lawful rules of practice and by a determination of the proper officers to the effect that lands were non-mineral lands. By such a decision the Department would have acquired jurisdiction if it was empowered by the grant to pass upon the quality of the lands.

2. No such notice was given, and therefore the Department had no jurisdiction of the parties interested or complete jurisdiction of the *res*.

3. No such investigation was had.

4. No determination was recited in the patent or in fact made to the effect that the lands were non-mineral lands.

5. On the contrary, the entire question of the ascertainment of the quality of the lands was left open for further consideration, and no jurisdiction to

convey such lands was even purported to be acquired by the Land Department.

6. Nor can the lack of recited jurisdictional facts be supplied by any presumptions contrary to the express language of the record and to the facts themselves.

III. Question Third reads:

> "THIRD: Is the reservation and exception contained in the grant of the patent to the Southern Pacific Railroad Company void and of no effect?"

Answer: No. For the following reasons:

1. It is not inconsistent with any recited or actual decision of the Land Office.

2. It does not operate in limitation of the grant but to effectuate it in accordance with its intent.

3. It is a compliance with the express terms of the joint resolution of 1870.

4. It places beyond question, in express language, the fact that the intent of the Department in executing this patent was to leave open for subsequent consideration the question of the mineral or non-mineral quality of the lands. It is equivalent to an express declaration that no decision was rendered—a declaration which the Department had power to make.

5. It was expressly accepted by the Railroad Company.

IV. Question Fourth reads:

> "FOURTH: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?"

Answer: No. For the following reasons:

1. The mineral reservation is not void, but is valid.

2. The patent is not collaterally attacked in this action inasmuch as we insist that we are upholding it according to its terms.

3. Even if collaterally attacked and if the reservation were void, still, inasmuch as neither from the patent itself nor from any evidence produced in support thereof can proof be drawn of the existence of the necessary jurisdictional facts, the patent is void as to the mineral lands under any circumstances and no presumptions to the contrary are indulged in.

V. Question Sixth reads:

> **"SIXTH: Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?"**

Answer: Yes; but this question is immaterial in the present case where we stand upon the entire failure of the patent to pass title to the lands in question.

VI. Question Seventh reads:

> **"SEVENTH: If the mineral exception clause was inserted in the patent with the consent of the defendant Southern Pacific Railroad Company and under an understanding and agreement between them and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company estopped to deny the validity of said clause?"**

Answer: Yes. For the following reasons:

1. Considered as a deed the patent contained an express reservation universally recognized as valid both as between individuals and as between the Government and a patentee, and by which the patentee by acceptance of the patent became absolutely bound.

2. This is emphatically the case where the patent thus excepted was recorded by the patentee, where sub-grants containing the same exception were made to third persons, and where no objection to the form of the instrument was ever raised during the eighteen years elapsing since its issuance.

3. Considered as a judgment, which no attempt was made to correct, it is binding upon both parties in accordance with its terms, and not otherwise, and no presumptions can be indulged in to the contrary.

POINT XVII.

As to the Fifth Question certified.

This is the only question remaining to be answered.

The subject has been fully considered in our principal brief (pp. 343 *et seq.*), and in a supplemental brief.

Over this ground it is unnecessary for us again to travel, but we cannot refrain from quoting the following language from the latest work upon the subject, published under date of July 1st, 1912:

> "Whatever may have been thought of oil or natural gas at one time, it is now established beyond any question that oil or petro-

leum and natural gas are minerals and judicially must be so treated."

Thornton on Oil and Gas, Sec. 18, 2nd Ed., July, 1912, and many cases cited.
Ohio Oil Co. v. *Indiana*, 177 U. S., 190.

An examination of these authorities as well as the others above referred to will, we think, satisfy the Court that not only is petroleum a mineral from the scientific standpoint, but it has always been so considered by Congress in connection with its public land laws, and by the Land Department in its administration and enforcement thereof.

The supplemental memorandum filed by appellees proceeds on the theory that the question arising under the Act of 1866 as to the meaning of the words "not mineral" is to be decided by the chemical analysis of California petroleum. Unfortunately for this contention, the question before the Court is one of law and not one of chemistry. The definition of the word "mineral," derived from the decisions of this Court and of various State Courts, appears to include practically every article derived from the soil by any of the known processes of mining. The Land Department in an exhaustive opinion (*In re Union Oil Co.*, 25 L. D., 351), in which is reviewed all of the American authorities, has concluded that petroleum is a mineral within the meaning of the United States Statutes affecting the public lands. The legislative position of the Federal Government on the subject is set forth in the Act of Congress approved February 11, 1897 (29 Stat., 526), in which are mentioned "petroleum or other mineral oils," and in which it is provided that petroleum lands may be entered and patented under the placer mining laws. Appellees place their main reliance upon certain British cases, none of which involve a statute or policy at all comparable to the United States Statutes or policy, and upon the Pennysylvania decision of silver (*Re Bush*, 213 Pa. St., 195). Without reviewing the several Pennsylvania cases, many of which

reach a contrary result, suffice it to state that they all involve language or reservations in deeds and that the diverse views adopted seem irreconcilable.

Lastly, so far as this case is concerned, the matter is, we submit, settled in our favor by the language of the Act of 1866, which says:

> "All mineral lands * * * are hereby excluded from the operation of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated AGRICULTURAL lands * * * may be selected.",

except Coal and iron

IN OTHER WORDS, THE WORD MINERAL IS USED IN THIS ACT IN DISTINCTION TO AGRICULTURAL. IT COVERS ALL LANDS MORE VALUABLE FOR NON-AGRICULTURAL PURPOSES THAN FOR AGRICULTURAL PURPOSES.

PETROLEUM LANDS CERTAINLY FALL WITHIN THE NON AGRICULTURAL CLASS.

Dated January 6th, 1913.

Respectfully submitted,

EDMUND BURKE,
In *pro per.*

FREDERIC R. KELLOGG,
ROBERTS WALKER,
EDMUND BURKE,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

NO. 682.

EDMUND BURKE, APPELLANT,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING & OIL COMPANY, APPELLEES.

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

In view of the brief filed in this cause by the Northern Pacific Railway Company, as a friend of the Court, and upon further research concerning the validity of the mineral exception in the patent, it has seemed desirable to prepare a supplemental memorandum setting forth more fully than in any preceding brief the history and effect of this clause.

The points to which we desire to call attention are:

I.

History of the Mineral Exception.

Prior to 1860 such railroad land grants as had been made by the government covered principally lands in

which minerals were not found to any substantial extent.

In 1862, however, grants of western lands which were supposed to be rich in minerals were commenced; and, as shown in point I of our brief of argument, continued until 1871. During this time, as shown by the government's brief, the total amount of lands thus granted aggregated something like one hundred and twenty-five million acres.

No adequate provision whatever was made at the same time by Congress for any real examination of these lands for the purpose of ascertaining what parts of them were mineral, and what parts were non-mineral in quality.

Confronted by this situation, the then Acting Commissioner of the Land Office, as shown by the government's brief, formulated in 1865 the mineral exception clause, substantially as found in the present patent, which exception was thereafter inserted in all, or practically all, railroad land grant patents until 1904.

This clause was devised for the express purpose of protecting the interests of the United States in connection with the exceptions of mineral lands in railroad grants, in the only way which was possible in view of the existing resources and powers of the land department.

As further shown by the government's brief, this custom was fully reported to Congress in 1868.

In 1870 the joint resolution regarding the Southern Pacific grant was adopted.

In 1895 Congress recognized the difficulty of the situation by appointing a special commission for the purpose of ascertaining such mineral lands as were included in the Northern Pacific land grant.

In 1904 the use of the mineral exception was discontinued, under Secretary Hitchcock's ruling, which was made upon an *ex parte* application of the Northern Pacific Railroad.

The practice of using the mineral exception was, however, resumed in 1911, and has since been continued to the present time.

The mineral exception was therefore born of absolute necessity.

The terms of the railroad grants were specific in their exclusion of mineral lands.

But there was no possible way in which mineral lands could be excluded, save by the use of this exception in the patents.

And the necessity and propriety of adopting this mode was expressly recognized both by the land department and by the various patentees, and was at least tacitly, and we say expressly, recognized by Congress as well.

II.

Grounds Upon Which the Mineral Exception is Attacked.

They are three:

1. Upon the claim that the exception might be as broad as the grant.

2. Upon the claim that the exception is void for uncertainty.

3. Upon the claim that it was beyond the power of the land department to insert it in the patent, and that therefore it must be regarded as superfluous.

III.

As to the Claim That the Exception is Too Broad.

This point is not argued by the appellees, but is argued in the Northern Pacific brief. The answers to it are:

1. That this is a mere common law rule, based upon authorities of much antiquity, and is wholly inapplicable to the construction of a statutory land grant.

> "It is always to be borne in mind in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the will of Congress. That intent should not be defeated by applying to the grant the rules of the common law which are properly applicable only to transfers between private parties. * * * But the rules of the common law must yield in this, as in all other cases, to the legislative will."
>
> M. K. & T. R. R. v. K. P. R. R., 97 U. S., 497.
> U. S. v. S. P. R. R., 146 U. S., 598.

2. In the next place, even this technical rule of the common law does not apply, where there is a mere possibility that the exception might prove as broad as the grant.

See Van Ness v. Rooney, 160 Cal., 131.

3. Moreover, the matter, so far as land grants are concerned, seems to us to be settled by the specific language of the Barden case, quoted in point VIII in our brief of argument, as follows:

> "And it will hardly be pretended that Congress has not the power to grant portions of the

public land with a reservation of any special products thereof, whether minerals or quarries contained therein, and whether known or unknown."

See page 314.

4. Manifestly, if the grant containing such a reservation is legal, a patent issued in strict conformity with the terms of the grant cannot be successfully attacked upon this ground.

IV.

As to the Claim That the Mineral Exception is Void for Uncertainty.

This is specifically disposed of by the cases cited in the last point of this memorandum. (97 U. S., 497, 146 U. S., 598.)

The Court said, as a part of the quotation above given—

> "To the validity of such transfers (i.e., between private parties) it may be admitted that there must exist a present power of identification of the land. * * * But the rules of the common law must yield in this, as in all other cases, to the legislative will."

V.

As to the Claim That the Mineral Exception is Void Because in Excess of the Power of the Land Department.

The cases relied upon by the appellees are Cowell v. Lammers, Francoeur v. Newhouse, Deffebach v. Hawke, Davis v. Weibbold, and Shaw v. Kellogg.

These cases have already been discussed in part in our brief of argument on pages 42 to 44, inclusive.

But we wish now to make, more clearly than before, the point that

In every one of these cases the mineral exception which was disapproved by the court was not in accordance with the terms of the grant or law under consideration, but operated to change the legal rights of the parties.

Thus in the first two cases above mentioned, the grant was construed by the court as only excepting lands which were known to be mineral at the time of the grant. The patent which was issued many years after contained the same mineral exception as that which is at issue in this case. In other words, the language of the exception in the patent did not limit the exclusion of mineral lands to those which were known to exist at the time of the grant, but was so broad as to exclude all mineral lands which either at the time of the patent or thereafter might be discovered to be mineral.

In other words, if the exception had been considered valid, it would have been absolutely inconsistent with, and would have enlarged the legal effect of the grant itself, as the court then construed it.

We have already called attention in our brief of argument to the fact that the construction which the court put upon the grant in these two cases, as limiting the exception to lands which were known to be mineral at the time of the grant, was repudiated in the Barden case.

In Deffeback v. Hawke, exactly the same situation arose, and the specific reason given by the court for repudiating the mineral exception was that this ex-

ception, if it had been inserted, would have been without support in any of the legislation of Congress, and would have been inconsistent with the rights which this legislation gave to the patentee of the lands.

In Davis v. Weibbold, we again find precisely the same situation, for the exception in the patent, if it had been given operation by the court, would have been inconsistent with the rights given by law to the patentee. The court specifically put its decision upon the ground that the officers of the land department could not limit or enlarge the rights of any patentee—a proposition in which we are in hearty accord.

In Reynolds v. the I. S. Mining Company, 116 U. S., 687, it was expressly intimated that a mineral exception which was in strict accord with the terms of the statute, would be valid.

The same intimation was made in Noyes v. Mantle, 127 U. S., page 354.

And in the Barden case it was expressly stated, at page 331, that the government would not be authorized to issue a patent covering lands supposed to be mineral without excepting these mineral lands until it could have an opportunity to make an adequate examination of the territory.

In other words, we believe it to be a rule established by the unvarying current of authority that the mineral exception strictly in accordance with the terms of the statute or grant, is valid, whereas such an exception contrary to such terms is void.

Tested by this criterion, the exception in the present patent is absolutely valid, since it is in strict conformity with the intention of Congress, as manifested in the original grant and in the joint resolution.

VI.

As to the Effect Upon the Patent in Case the Mineral Exception Was Held to Be Illegal, as Beyond the Power of the Department.

In their arguments in the courts below, and upon the present appeal, counsel for the appellees appear to proceed upon the theory that if they can strike the mineral exception out of the patent, their course will be clear, and they will be enabled to rely upon the general language of the granting clause as giving them full title to all lands described, whether mineral or not.

Such a contention is submitted to be wholly baseless.

The patent, whether the mineral exception be considered good or bad, was drawn, signed and issued as an entirety.

The general words which it contains were expressly qualified and limited in their effect by the mineral exception.

The government never for one moment intended to absolutely grant all of the lands described, but only to grant them subject to the express qualification of the mineral clause.

The instrument was and is a unity and the intent of the parties to it can only be ascertained by considering it as a whole, as an entirety, and not by disgambering it into its component parts.

And if any part of this entire instrument be considered as void, and if the elimination of it from the consideration of the instrument would result in giving to that instrument an intent different from that in the mind of its maker, then *the entire instrument, and not merely the eliminated part, must be taken as void and ineffective.*

This principal is, we submit, perfectly established.

Cases which are most nearly analogous arise where statutes have been held to be unconstitutional in part.

In all such cases if the part held unconstitutional modifies or effects, or otherwise qualifies the part which is not held unconstitutional, the entire statute will be held void and not merely the particular part criticised.

The rule is entirely different if the various parts of the same statute are entirely separate and distinct, so that the full legislative intent of the good part can be given effect without modification, and the legislative intent in the bad part can be annulled without affecting the good.

But wherever a statute consists of two parts, one of which contains general language, and the other of which contains a proviso or an exception qualifying this general language, then if the exception or proviso is held to be bad, the entire statute falls.

> *"If by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."*
>
> Lewis' Sutherland on Statutory Construction, Section 308-307.

We are, therefore, in a position where we can look with much calmness upon the efforts of the appellees to taint the only source of their alleged title to these mineral lands.

The mineral exception is either perfectly valid or perfectly illegal.

If the first alternative be adopted, the railroad gets

no title to any mineral lands, for no such title was intended to be conveyed.

If the second alternative be adopted, then this exception, being a proviso, affects the validity of the entire instrument, which must be construed as a unit, and the whole patent falls to the ground.

If this be so the situation is then the same which would exist if no patent had ever been executed.

And if this is true, then the appellees' title stands merely upon the original grant which, of course, excluded mineral lands.

In either event the contention of the appellant must, it is submitted, prevail.

Respectfully submitted,
FREDERICK R. KELLOGG,
ROBERTS WALKER,
EDMUND BURKE,
Of Counsel for Appellant.

January 10, 1913.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, *Appellant*,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

No. 280.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, *Appellants*,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM ON BEHALF OF APPELLANTS IN REPLY TO SUPPLEMENTAL MEMORANDUMS BY THE SOUTHERN PACIFIC RAILROAD COMPANY, ET AL., AND BY THE UNITED STATES.

In the supplemental memorandum on behalf of the United States filed by the Solicitor General, it is very briefly

brought out that in the oral argument and in the briefs submitted prior to that time the question presented by the fifth question certified to this court by the Circuit Court of Appeals was treated as a question of law. That question reads:

> "Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral lands from the railroad land grants?"

Counsel for appellants did consider the question as presenting a question of law, and counsel does not now understand that it is within the province or authority of the Circuit Court of Appeals to certify to this court, for its consideration and answer any other question than one of law.

As to the supplemental memorandum filed by the Southern Pacific Railroad Company and Kern Trading and Oil Company subsequent to the oral arguments, confined to a consideration of the fifth question, it appears there was attached to that memorandum as an exhibit a copy of a thesis prepared by Mr. E. T. Dumble, consulting geologist of the Southern Pacific Company. The Solicitor General takes exception to the contents of this thesis, both as to its substance and as to the correctness of the quotations from other scientists, especially the chief geologist and the chief chemist of the United States Geological Survey.

Counsel for appellants do not desire to in any manner enter into the controversy between the representatives of the Southern Pacific Company and the representatives of the United States concerning the accuracy or propriety of Mr. Dumble's thesis. At most, Mr. Dumble's statements and those of the scientists whom he cites are only the opinions of a limited number of scientists upon a question that they admit is controverted and concerning which there is a diversity of opinion among them, which, from the viewpoint

of the scientist, is irreconcilable. The main reason which leads counsel for appellants to submit this memorandum is the undue importance that seems to be attempted to be given to the fifth question in the determination of this controversy and especially to what seems to us the unwarranted importance given to the scientific discussion of the question of fact, as to whether or not, from the viewpoint of the scientist in his classification of substances, petroleum should be classified as a mineral substance.

The question presented by the record before the court is a question of law, which is not dependent upon whether petroleum is an organic substance or distillation of an organic substance through natural processes, or is of inorganic origin. The question is, what was the intent of Congress when it excepted from the grant to the railroad company all mineral land, without limitation or restriction, other than coal or iron land. The answer to that question, in our opinion, depends upon whether, *as a matter of law,* petroleum is a mineral. When Congress made the grant it did not contemplate that the substances that would be held to be minerals and sufficient to except lands containing them from the grant, were to be identified by the opinion of scientists, especially where the scientists themselves are in irreconcilable disagreement. We prefer to think that Congress intended that this question in case of controversy should be decided and determined by the judicial tribunals of the Government.

When the briefs were submitted prior to the oral argument it was the opinion of counsel for appellants that this question had been so well settled by the courts that no ground for extensive discussion or elaborate consideration existed. In the case of Northern Pacific Railroad Co. vs. Soderberg, 188 U. S., 526, this court said:

"The rulings of the land department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, *petroleum*, limestone, building stone, and coal. * * *

We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the Act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say we see nothing in that Act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, *we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.*" (Italics ours.)

When the Soderberg case was before the United States Circuit Court, Judge Hanford in considering this question used the following language:

"In common and ordinary signification the word 'mineral' is not a synonym for 'metal,' but is a comprehensive term, including every description of stone and rock deposit, whether containing metallic substances or entirely non-metallic. * * * If Congress had intended by this Act to interpret the reservation

clause of the granting Act so as to give a restricted definition to the word 'mineral,' there is no good reason why it should not have directed that only land valuable for the metalliferous minerals therein should be classified as mineral land; but it is significant that, instead of prescribing any such limited rule, the words of the Act correspond with the words in the grant expressing the purpose to reserve all minerals, the test being, not the nature or quality of the mineral, but its value; and lands containing any mineral deposits of sufficient value to be subject to sale by the Government under the provisions of the United States mining laws are required to be classified so as to come within the class of lands which are reserved."

The land department uniformly has held that petroleum is a mineral and has disposed of the public lands containing deposits of petroleum under the placer mining laws. This practice has been followed by the land department ever since the enactment of the mining laws in 1872. In the case of Pacific Coast Marble Company vs. Northern Pacific R. R. Co., *et al*, reported in 25 L. D., 233, the question of what is mineral is considered at length and previous holdings by the Secretary of the Interior, as well as other authorities, are reviewed, and it is held,

"That lands containing valuable mineral deposits, whether of metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry, under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are 'mineral lands' within the meaning of that term as used in the exception from the grants to the railroad company and to the State."

And in the case of Union Oil Company, 25 L. D., 351, it was specifically held that petroleum is a mineral and lands

containing deposits of petroleum were excepted from the grant to the Southern Pacific Railroad Company made by the Act of March 3, 1871, which Act is in precisely the same words as the Act of July 27, 1866, involved in this case. The Secretary calls attention to a decision of the Department holding that petroleum is not a mineral, rendered by Secretary Hoke Smith August 26, 1896, and to the prompt action of Congress in correcting the error of the Secretary by the passage of the Act of February 11, 1897. The holding in the Pacific Coast Marble Company, *supra*, was adhered to:

> "That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and qaulity sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."

In Murray vs. Allard, 100 Tenn., 100, 39 L. R. A., 249, the question was considered very carefully and exhaustively. This was a suit to determine title to petroleum under land which had been granted by a deed containing a clause reserving to the grantor "all mines, minerals, and metals in and under the land." This deed was dated October 24, 1853, thirteen years before the approval of the Act of July 27, 1866, and forty years prior to the issuance of the patent involved in this case. Subsequent to the deed containing the exception clause conveyances had been made to third persons without reservation and the present owners held under a deed conveying in fee simple without reservation. The trial court held that petroleum was not embraced in the term "mineral," the Court of Chancery Appeals reversed the trial court in an opinion which the Supreme

Court of the State characterized as "very exhaustive, elaborate, learned, and able," and which it adopted in full as its opinion. The court exhaustively reviewed the scientific authorities from which it found that "Clearly, from this description of the substance it could not in any sense fall under the terms 'metal' or 'metallic,'" and said: "The question, then, to be determined is, does it fall within the terms 'mines and minerals'? In 2 Rapalje & L. Dict., p. 821, it is said: 'In the most general sense of the term, minerals are those parts of the earth which are capable of being got from under the surface for the purpose of profit. The term therefore includes coal, metal ores of all kinds, clay, stone, slate, and coprolites,'" and quotes from 15 Am. and Eng. Enc. of Law, page 500, as follows:

> "'Minerals' originally signified that which is obtained from a mine, from underground workings as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paintstone and similar substances; * * *"

and further says:

> "We have found only one authority opposed to the conclusion that petroleum is a mineral, that is the case before referred to, of Dunham vs. Kirkpatrick, 101 Pa., 36, 47 Am. Rep., 696. The great weight of authority is not only opposed to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature, such as gold, silver, copper, lead, etc.; that, in the popular estimation, petroleum is not regarded as a mineral substance any more than is animal or vegetable oils; and that it would only be classified as such in the most general and scientific sense. So, in the light of this assumed general

> view of the bulk of mankind, petroleum was held not to fall within the reservation as to minerals. We think, however, that the true meaning of the word 'mineral,' as well as the meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals. This case seems to be opposed in principle by the later case of Gill vs. Weston, 110 Pa., 313, where petroleum was held to be a mineral substance in construing the Pennsylvania act of 1855 concerning the mortgaging of terms of mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.' In the light of these authorities we are bound to hold that petroleum is a mineral, and that it falls within the term of the reservation in the deed fererred to in the foregoing case."

In Kelly vs. Ohio Oil Co., 57 Ohio St., 317, 39 L. R. A., 765, the Supreme Court of Ohio holds that,

> "Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract."

In Wilson vs. Hughes, 39 L. R. A., 292, the Supreme Court of West Virginia quotes with approval a number of cases holding that oil is a mineral and being a mineral is part of the realty. In Sult vs. Hochstetter Oil Co., 63 W. Va., 317, the Supreme Court of West Virginia unqualifiedly held that petroleum is a mineral and as such came within the general exception of minerals contained in a deed dated March 9, 1880. The court said:

"This brings us to the construction of the reservation clause in the deed from Eleanor Marshall to Elzada I. Harrison, reading as follows: 'And the party of the first part reserves to herself the right to all minerals in and under fifteen acres of the land conveyed,' which fifteen acres is described in the deed by metes and bounds. The meaning of the term 'minerals,' in the law of conveyancing, has received very great attention by the English courts, and MacSwinney on Mines, p. 12, predicates, upon a thorough review and analysis of the English decisions, the following conclusions: '*Prima facie,* the word mineral must be taken to have a more extensive meaning than its etymology would seem to justify. It has, in fact, been laid down that mineral will, *prima facie,* include every substance which can be got from underneath the surface of the earth for the purpose of profit. And this is apparently the strict scientific meaning of the word. Mineral will, therefore, *prima facie,* include not merely such articles as coal and ironstone and freestone, but fire-clay and chine-clay or porcelain-clay, and also every kind of stone, flint, marble, slate, brick-earth, chalk, gravel, and sand: provided only that these articles are under the surface, and do not lie loosely upon it.' A vast array of authority cited by him, which need not be analyzed here, sustains this conclusion and shows that the word minerals found in a deed, lease or other contract, unqualified and unrestricted by any other clause in the instrument or by icrcumstances within the knowledge of the parties which may reasonably be deemed to have determined their intention, is given this broad meaning and effect. He says, however, that in all cases a *prima facie* meaning of the word will yield to the intention of the parties, when, from the language of the instrument in question, such intention is made reasonably clear, or the particular circumstances under which an instrument of sevseverance takes place shows an intention to restrict its meaning, and, in doubtful cases, its meaning will be restricted to that given it by the customs of the coun-

try in which the contract is to operate. *Id.* 15, 17. As to whether oil or gas are minerals, these decisions are silent, presumably for the reason that no litigation involving these substances seems to have arisen in the courts of that country; but, in view of the holdings, and the expressions of opinion, found in English decisions, defining the meaning of the term, and extending it to every substance or material that can be profitably taken and used from beneath the surface, no doubt can be entertained as to what the conclusion would have been, had such a question been presented, and the principles declared point unerringly to the view that both these substances would be regarded as minerals in the law of contracts. *That such is the prima facie meaning thereof, in general law, is universally declared by the courts of this country. This is so well understood that no authority for it need be cited."*

The court then refers to Dunham v. Kirkpatrick, 101 Pa. St., 36, and Dettor vs. Holland, 57 Ohio St., 492, which hold that oil is not a mineral and says concerning the doctrine followed by the Supreme Court of Pennsylvania:

"In many cases, the court has held oil to be mineral in the sense that it is part of the realty. Stoughton's Appeal, 88 Pa. St., 198; Funk vs. Haldeman, 53 Pa. St. 229. It was held to be a mineral substance within the meaning of the statute providing for mortgages on mining land. Gill vs. Weston, 110 Pa. St., 312. Oil and gas are held to be minerals, and, therefore, a part of the corpus of the land, as between life tenants and remainder men. Blakley vs. Marshall, 174 Pa. St., 425. Marshall vs. Fallon, 179 Pa. St., 371. It is to be observed, in this connection, that these decisions do not necessarily conflict with that of Dunham vs. Kirkpatrick, for they declare that, *in a legal sense, oil and gas are minerals,* while the other case declares that, as tested by the intention of the parties to a deed, disclosed by the terms therein, viewed in the light of the

popular meaning of the term, a mere matter of contract, they are not minerals. The determination of the question of intention by that standard seems to us inevitably to produce a contrary result. Legally and scientifically, oil and gas are universally held to be minerals. At the present time they are popularly so considered."

In Weaver vs. Richards, 156 Mich., 320, decided April 14, 1909, the Supreme Court of Michigan held that the word "mineral" or "minerals" without qualification would include both oil and gas. The court said:

"The instruction of the circuit judge to the jury very clearly covered the case upon this ground, unless there was error in the instruction complained of, as follows: That the use of the word 'mineral' or 'minerals' without any qualification, would include both oil and gas, and therefore that a reservation of minerals in place in the earth would include both gas and oil, coupled with the instruction that a reservation of such minerals would imply the right to prospect, explore for, and remove these minerals.

It is contended by the plaintiff, on the authority of Dunham vs. Kirkpatrick, 101 Pa., 43, that the use of the words 'all minerals' is not sufficient in a reservation to include petroleum, oil, or gas. So far as our examination goes, this case stands alone. The weight of authority is decidedly in favor of the construction given by the trial judge. A well-considered case is that of Murray vs. Allred, 100 Tenn., 100 (39 L. R. A., 249). In this case the authorities are collected and need not be here repeated. The reasoning of the court is convincing, and its criticism of Dunham vs. Kirkpatrick, is, we think, justified. The ruling of the circuit court upon this point was correct."

We have cited and quoted from the opinions of the highest courts of Pennsylvania, West Virginia, Ohio, Tennes-

see and Michigan from the decisions of the Secretary of the Interior whose jurisdiction extends to all the public land States and from an opinion of this court, all of which hold that petroleum is a mineral. This is the law of these States and also of California, and they contain the most important oil-producing areas in the United States. Wherever the question has been adjudicated it has been held that petroleum is a mineral. The only cases we have found holding to the contrary are Dunham vs. Kirkpatrick, 101 Pa., 36; Dettor vs. Holland, 57 O. St., 492, and the opinion of Secretary Hoke Smith, all of which have been distinctly and unequivocally disapproved by the same tribunals from which they emanated. It is rarely that such a unanimity of opinion is found to be entertained by the courts upon any question.

At the time this grant was made to the Southern Pacific Railroad Company Congress had before it a report by Professor S. S. Hays which had been transmitted to the Speaker of the House of Representatives February 26, 1866, by the Secretary of the Treasury. 39th Congress, 1st Session, Ex. Doc. No. 51. In this report Professor Hays considers petroleum as a source of national wealth, discusses the history of the petroleum industry in the United States and elsewhere, gives chemical analyses, states tables showing production in various districts, together with other information. It can not be said that Congress was without knowledge of the subject. If it was intended that the grant should operate to transfer to the railroad company petroleum lands it certainly would have named petroleum lands as well as iron and coal lands. If any doubt existed as to the intention of Congress it should be removed by its action in promptly correcting by legislation the erroneous holding of the Secretary of the Interior as above set out.

We do not wish to be understood as suggesting that this question has been thrust forward by counsel intentionally to befog the real issues that should determine the decision in this controversy. We regret that counsel for the Government and counsel for the defendants have taken so seriously this controversy between their respective geologists as to make it the subject of especial attention for the consideration and determination of this court in this case. As we have shown, the courts repeatedly have declared that the overwhelming weight of scientific authority holds that petroleum is a mineral and that "in a legal sense" it is a mineral. There seems to be little controversy over the question, except between the geologists for the Government and the geologists for the railroad corporation. We think this controversy does not merit the attention of this court. It should not be permitted to transcend the more important and far more difficult questions before the court in this case, and we rest confident it will receive the attention it merits.

D. J. HINKLEY,
T. J. BUTLER,
Attorneys for Appellants.

FILED
DEC 17 1913
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 270.

EDMUND BURKE, APPELLANT,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 280.

J. L. LAMPRECHT and F. M. AIKEN, TRUSTEES, APPELLANTS,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

On a Certificate from the United States Circuit Court of Appeals from the Ninth Circuit.

Memorandum of December, 1913, by Appellant, Edmund Burke, in Reply to Supplemental Memorandums by the Southern Pacific Railroad Company et al. and by the United States.

FREDERIC R. KELLOGG,
ROBERTS WALKER,
Counsel for Appellant Burke.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, APPELLANT,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 280.

J. I. LAMPRECHT and F. M. AIKEN, TRUSTEES, APPELLANTS,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Memorandum of December, 1913, by Appellant, Edmund Burke, in Reply to Supplemental Memorandums by the Southern Pacific Railroad Company et al. and by the United States.

Pursuant to leave of the Court, the appellant Burke files this supplemental memorandum. In the Burke case (No. 279) and the Lamprecht and

the Aiken case (No. 280), the United States, during the present month, has filed herein a supplemental memorandum to which the defendant Railroad Company has filed a replying memorandum. In these memorandums discussion has been had of the chemical and geologic nature of petroleum. The subject has been approached as if it were wholly or almost entirely a question of fact. These appeals are before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit and, inasmuch as questions of law alone were certified, these appeals do not involve the decision of questions of fact, but necessitate the solution of legal questions arising in connection with the grant to the Southern Pacific Railroad Company, under the Act of July 27, 1866, Section 3.

We submit that the Fifth question was properly certified as a question purely of law and of statutory interpretation, and that the chemical or geological facts relating to the creation and nature of petroleum are wholly irrelevant, for the following reasons:

1. *Under the grant in question the term "mineral" (with the exception of iron and coal, which will be alluded to later) is used as meaning simply "non-agricultural."*

> See Lien Land Provision, Sec. 3, Law of July 27, 1866.
>
> See Appellant's Brief of Argument and Reply Brief, page 62.

Petroleum lands are certainly not agricultural lands.

The grant embraced "every alternate section of the public land, not mineral." As a question of law, only two categories may here co-exist, viz.,

(1) mineral lands and (2) lands not mineral. There is no possibility of a third category. Even if there should be found beneath the surface of the ground substance concededly animal or organic in character (as, for instance, guano), such land would, nevertheless, have to be classed as either mineral land or as non-mineral land, as a matter of statutory interpretation based upon the language of the grant. The language of the grant does not admit of the existence of a third category such as lands containing subjacent substances not concededly geological or mineral, but likewise not recoverable by any of the ordinary processes of agriculture or lumbering. It is therefore submitted that the discussion of the chemical and geological nature of petroleum is beside the mark.

2. A reductio ad absurdum *would follow if the question of the nature of the lands were attempted to be disposed of chemically or geologically.*

For all soil is mineral, chemically and geologically considered.

Notably would this be so in the case of desert land like the present.

Hence, if this test be applied, there would never have been any land grant at all, which, of course, is an absurdity.

3. *That the meaning of the word "mineral" in this Land Grant was not intended by Congress to be determined chemically or geologically is further shown by the fact that the grant expressly provides:*

> "Provided further that the word 'mineral' when it occurs in this Act shall not be held to include iron *and coal*."

Evidently Congress recognized that coal would have been considered as a mineral had it not been excepted from that category.

But there can, of course, be no question but that coal is a substance purely organic in its origin.

It is, therefore, plain that Congress was paying no attention whatever to chemical or geological considerations.

4. *The clear trend of statutory enactment and judicial decision has been that in the absence of special provisions to the contrary, the term "mineral" is intended to refer to substances in the earth's crust which are sought for and removed by man for the substances themselves.*

1 *Snyder Min.*, Secs. 134, 140, 143, 145.
2 *id.*, Sec. 926.

In other words, where the principal value of lands lies in substances therein contained which value can only be developed by the extraction of such substances, the lands are ordinarily mineral and not agricultural lands; and *vice versa*, unless special exceptions exist in some statute or private grant.

Under this definition it is needless to say that petroleum lands fall within the non-agricultural, or mineral, class.

5. *This view has, we think, been consistently followed by the Courts of the United States in cases involving petroleum as well as many other substances, arising under land grants and otherwise.*

Northern Pacific v. *Soderberg*, 188 U. S., 526.

Webb v. *American Asphaltum* Co., 157 Fed. Rep., at page 207 (Van Devanter, J.).

"Oil and gas *being minerals* and to be regarded as real estate," etc.

Lindsley v. *The Gas Co.*, 162 Fed. Rep., 958, affirmed, 220 U. S., 74.

"The instrument was more in the nature of a grant * * * of all the oil and gas in the lands described—*these minerals* being part of the realty," etc. * * * "Oil and gas are usually found in porous rock * * *. Unlike coal, iron *and other minerals* they do not have a fixed situs."

Brewster v. *Lanyon Zinc Co.*, 140 Fed. Rep., at pages 807, 809, 815, 817.

Kansas Gas Co. v. *Haskell*, 172 Fed. Rep., 562, at pages 562, 564, 573.

Gird v. *California Oil Co.*, 60 Fed. Rep., 531.

"True it is that oil and gas, *like other minerals*, are situated," etc.

Ohio Oil Co. v. *Indiana*, 177 U. S., at page 202, bottom (Mr. Chief Justice White writing the opinion).

Bacon v. *Walker*, 204 U. S., at page 316, approving 177 U. S., 190 (Mr. Justice McKenna writing the opinion).

Oklahoma v. *Gas Co.*, 221 U. S., 229 at pages 252-260, approving 177 U. S., 190 and 220 U. S., 61.

6. *Under the rulings of the Land Department and the Act of 1897, the same situation exists.*

The uniform practice of that Department was to treat petroleum lands as mineral lands until the

decision of Secretary Hoke Smith on August 26th, 1896, to the contrary. This decision was immediately followed, however, by the Act of Congress approved February 11th, 1897 (29 Stat., 526) restoring the former practice.

This was followed by the decision of the Department in the Union Oil Company case (25 L. D., 351), specifically holding that petroleum is a mineral.

In other words, we submit that not only in land grant cases, but in all other cases known to us, in which the Federal Courts and the Land Department have passed upon the question (with the one exception above quoted, which was immediately corrected), petroleum land has been treated as mineral land both within the intent of the law-making bodies and the Courts in connection with the various questions which have arisen, and Congress has expressly approved this view.

7. *The claim that this question, arising as it does under a land grant, should be disposed of as a question of fact and not of law, is, we think, disposed of by the ruling in the Soderberg case:*

> "The fact that the Land Department has not determined whether the land in question was mineral or non-mineral *does not involve a question of fact*, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral *under the terms of the grant.*"
>
> *Northern Pacific Ry.* v. *Soderberg*, 188 U. S., 528.

In conclusion, we desire to say that the many Congressional enactments have established, we believe, that for purposes of the United States

Railroad Land Grants, all of the public lands of the United States must be considered as arbitrarily divided into agricultural and non-agricultural (with the single exception above stated). *This distinction was never intended to depend upon facts or theories of chemists or geologists.* To hold at the present time that the opinion of learned scientists as to what petroleum really is, should be sufficient to upset this long established classification, would be to endanger the title of thousands of acres of land heretofore filed upon, pursuant to decisions heretofore made, and would, we submit, defeat the clear intention of Congress and overturn the practically uniform current of decisions of the Land Department and the Courts.

Respectfully submitted,

FREDERIC R. KELLOGG,
ROBERTS WALKER,
Counsel for Appellant Burke.

[3862]

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Office Supreme Court, U. S.
FILED.
JAN 6 1913
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.
No. 279

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.
No. 280

BRIEF ON BEHALF OF NORTHERN PACIFIC RAILWAY COMPANY. FILED BY LEAVE OF COURT.

CHARLES W. BUNN,
CHARLES DONNELLY.

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Supreme Court of the United States

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY. No. 682.

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY. No. 683.

The averments of the bill of complaint, as summarized in the certificate of the Circuit Court of Appeals, were as follows:

> That the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made

after discovery of mineral on the said respective claims; that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands;"

that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never

been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

Upon this certificate seven questions were submitted to be answered by this court of which the second, third, fourth and sixth are as follows:

SECOND QUESTION: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the

quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

THIRD QUESTION: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect.

FOURTH QUESTION: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with.

SIXTH QUESTION: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

With the particular facts, or alleged facts, above certified, and with the questions how far, if at all, they are admitted by the demurrer, and how far they are material, even if admitted, in view of the other facts certified, the Northern Pacific Railway Company is not directly concerned, and hence we do not undertake to discuss them. But it is vitally interested in the answers to be made to the Second, Third, Fourth and Sixth Questions above quoted. It has succeeded to the grant to the Northern Pacific Railroad Company, and, generally speaking, to the obligations as well as to the rights of that grantee. Like the grant to the Southern Pacific Railroad Company that grant was a grant of "every alternate section of public land, not mineral, designated by odd numbers," within certain defined limits. (13 Stat. 365.) It has been in process of administration now for nearly fifty years, and so far as known not an acre of mineral land or of land

thought by any one to contain mineral (except coal and iron, which were included in the grant) has been patented either to the Northern Pacific Railway Company or to its predecessor, the Northern Pacific Railroad Company, nor has either of those companies received, for any of the lands sold by them, a single dollar on account of any mineral value they were supposed to possess. Relying upon decisions of this Court which heretofore have never been questioned, they have accepted the patents issued as confirming in the grantee an absolute title to the lands described in them, subject to be defeated only on direct attack, by a showing of fraud, or imposition, or mistake of law in the procurement or issuance of them. The four questions above quoted suggest doubts as to these fundamental principles. It is possible to consider them abstractly, and apart from the special facts of the case in connection with which they are certified, and it is in this way that we propose to treat them. A negative answer to all or to any one of them would affect Northern Pacific titles precisely as it would those of the Southern Pacific Company; would precipitate anew questions which, for many years, have been regarded as settled, and would be utterly destructive of rights resting upon land grant patents. This is our apology, if any is needed, for the submission of this brief.

SECOND QUESTION: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land

Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

In considering this question it is to be observed:

(1) That it supposes a patent containing no excepting clause. The effect of the excepting clause is dealt with in the Third Question.

(2) That it has nothing to do with a patent purporting to convey lands *known* to be mineral. It deals expressly with "lands *which are thereafter ascertained* to be mineral."

(3) The question is not whether under the circumstances suggested the patent described is *voidable* as to lands thereafter ascertained to be mineral, but whether it "operates to convey" them; in other words, whether it is *void*.

It has been the belief of the profession for nearly twenty years that this question was settled in *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288; and it is startling to find that such a doubt can exist about it anywhere as to require its submission anew to this court.

That mineral lands were excepted from the grants to the Pacific Railroad Companies, and that it was the intention of Congress that title to such lands should not pass to those companies, are propositions about which there has never been any dispute. But it soon became apparent that these grants were of little value if the grantees could give to the lands covered by them only a title which would be rendered worthless upon the discovery of a fact of which everyone was ignorant when the title passed; and it was recognized on all hands that there must be some date at

which the question whether the lands were of the character which Congress had granted—in other words, whether they were mineral or non-mineral—must be taken as conclusively determined. The railroad companies insisted that as to any particular tract of land this date was the date of the filing of map of definite location opposite that tract; whilst the mineral claimants insisted that the question was open until the government should have evidenced its surrender of all claim to the tract by the issuance of a patent covering it.

The question finally came before the courts in an acute form in the *Barden* case. That was an action commenced in the United States Circuit Court for Montana, in 1891, by the Northern Pacific Railroad Company, against Barden and others, to recover possession of a tract of land in Montana lying within an odd numbered section in the place limits of the grant. The line of railroad was definitely located opposite this section July 6, 1882, and on that date the land in question was not *known* mineral land. Six years thereafter, in 1888, veins or lodes of rock bearing gold, silver and other metals were discovered in it; the defendants entered upon and made selections of these lodes, and at the time of the commencement of the action were in possession of the claims so located. No patent had been issued to the railroad company. The defendants demurred to a complaint showing these facts, and the case was heard before Sawyer, Circuit Judge, and Knowles, District Judge (46 Federal, 592). The court divided, Judge Sawyer sustaining the contention of the railroad company and granting the relief asked; Judge Knowles dissenting. The opposing views of the two judges will be gathered from the following extracts from their opinions.

Judge Sawyer said: (Page 603)

"A question has also been suggested in this case, as to when there must be a *'known mine'* in order to take it out of a grant to the railroad company under the exception in the grant? The four points of time suggested, are, the date of the act of congress making the grant; the time of the filing of a map of the general route; the time of the definite location and filing a plat thereof in the office of the Commissioner of the general land office, and the date of the issue of a patent. The ruling of the circuit court for the district of California, heretofore has been, that *the date of the definite location of the line of the road,* is the date at which the mineral character of the land must be known, in order to take it out of the grant. Thus upon the trial of *Francoeur v. Newhouse,* the court so charged the jury. The following is the language of the charge:

'The words "mineral lands," as used in the act of congress, mean lands known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant. * * * The question then arises, whether or not they were known, or there was sufficient reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land.' 14 Sawy. 603, 604, 43 Fed. Rep. 238."

Judge Knowles said: (Page 622)

"The surest means of quieting titles would appear to be, the determining the question of the

mineral character of the land *upon issuing of patents to the same.* As I have said, this would be conclusive upon all subsequent purchasers."

The case was brought to this court and was most elaborately argued in 1894, the Solicitor General appearing, with numerous other counsel, on behalf of the mineral claimants, and the railroad company being represented by Mr. James C. Carter. Here again the question presented was as to the date upon which the question whether lands were or were not mineral was to be deemed settled. That this is so will appear from the following passage from the argument of the Solicitor General, appearing at page 296 of the report:

> But it is said that this construction, which excludes lands in fact mineral from the operation of the grant, works a hardship because it leaves the title of the company forever uncertain in all its lands and liable to be defeated at any time by the discovery of minerals, and it is upon this ground that the opinion of the Circuit Judge proceeds. The objection would be serious if it were well founded. But what is the fact?
>
> The act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.
>
> But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued

a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields's original brief.

The point is also covered by the case of *Davis v. Weibbold,* 139 U. S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act, Rev. Stat. § 2392, that 'no title shall be acquired to any mine of gold, silver, cinnabar, or copper,' does not apply where the mines were discovered after a patent has been issued.

Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell v. Lammers,* 10 Sawyer, 246, 257: 'There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.'

And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior: 'The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.' And again, page 524: 'The grant or patent, when issued, would thus be held to carry with it the the determination of the proper authorities that the land patented was not subject to the exception stated.'

In *Moore v. Smaw,* 17 California, 199, it was decided, in the first opinion delivered by Mr. Justice Field as Chief Justice of the Supreme Court of California, that the patent of the United States passes title to minerals."

This court was divided in opinion, a majority sustaining the contention of the mineral claimants, in an opinion written by Mr. Justice Field. Justices Brewer, Gray and Shiras dissented upon the ground that the character of the land as known *at date of definite location* was controlling. The court held that mineral lands did not pass by the grant; and in answer to the objection that such a holding would leave the railroad company's title forever uncertain, Mr. Justice Field said, at page 326:

> "The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties as-

sert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance.

It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

And again at page 329:

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those

officers that they are one or the other will be considered as conclusive."

It is difficult to see how language could answer a question more plainly than the foregoing passages answer the question of the Circuit Court of Appeals. Every phase of the controversy had been presented and the court was unanimous upon the propositions that title to mineral lands *could* pass to the railroad grantee; that a patent *would* "operate to convey" them; and that in the absence of fraud, imposition or mistake it was conclusive. And as showing that the mere neglect of the Department to perform its duty previous to the issuance of the patent would not impair its validity, the court said, at page 330:

> "It is true that the patent has been issued in many instances *without the investigation and consideration which the public interest requires;* but if that has been done without fraud, *though unadvisedly*, by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

The language thus quoted is but a reaffirmance of what had been said long before by Chief Justice Marshall in *Polk's Lessee v. Wendall*, 9 Cranch, 87, 97, where it is said:

> "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These

rules are, in general, directory; and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is pre-supposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely unreasonable, to avoid a grant in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent."

The distinction between a void and a voidable patent has been noted many times by this court in language which makes it plain that a patent answering to the description contained in this Second Question would not be void. Thus in *Noble v. Union River Logging Railroad,* 147 U. S. 165, the court, after marking the distinction between void and voidable judgments, says at page 174:

"This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been *reserved,* or was at the time *no part of the public domain,* the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk's Lessee v. Wendall,* 9 Cranch, 87; *Patterson v. Winn,* 11 Wheat. 380; *Jackson v. Lawton,*

10 Johns. 23; *Minter v. Crommelin*, 18 How. 87; *Reichart v. Felps*, 6 Wall. 160; *Kansas Pacific Railway v. Dunmeyer*, 113 U. S. 629; *United States v. Southern Pacific Railroad*, 146 U. S. 570.

Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *Smelting Co. v. Kemp*, 104 U. S. 636, 640: 'In that respect they' (the officers of the Land Department) 'exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.' In *French v. Fyan*, 93 U. S. 169, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Steel v. Smelting Co.*, 106 U. S. 447; *Quinby v. Conlan*, 104 U. S. 420; *Vance v. Burbank*, 101 U. S. 514; *Hoofnagle v. Anderson*, 7 Wheat. 212; *Ehrhardt v. Hogaboom*, 115 U. S. 67. In *Moore v. Robbins*, 96 U. S. 530, 533, it was said directly that it is a part of the daily business of officers of the Land Department to decide when a party has by purchase,

> by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. * * * The functions of that department necessarily cease when the title has passed from the government.'"

Mineral lands are, of course, a "part of the public domain" and they are certainly not "reserved" within the language above quoted, because they are patentable by the Department of the Interior upon a proper application for them, and that Department has complete "jurisdiction" over them, and "power or authority to dispose" of them.

This is recognized again in the case of *Burfenning v. Chicago, etc. Ry. Co.*, 163 U. S. 321, where the court says at page 323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not*, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases

of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley,* 13 Wall. 72; *Smelting Company v. Kemp,* 104 U. S. 636; *Steel v. Smelting Company,* 106 U. S. 447; *Wright v. Roseberry,* 121 U. S. 488; *Heath v. Wallace,* 138 U. S. 573; *McCormick v. Hayes,* 159 U. S. 332."

Again in *United States v. Schurz,* 102 U. S. 378, 400, this court said:

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, is confided, as we have already said, the adminstration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale. The question whether any particular tract, belonging to the government, was open to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction.

> When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void."

Speaking with scientific accuracy the whole grant was mineral. As this court said in *Northern Pacific Railway Company v. Soderberg,* 188 U. S. 526, 530, "all lands belong to the ***mineral kingdom,*** and, therefore, could not be excepted from the grant without being destructive of it." The exception, therefore, must have a narrower interpretation, and that interpretation was indicated in the *Soderberg* case, where it is said at page 536: "We are of opinion * * * that mineral lands include not merely metalliferous lands but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture."

The question then turns on the value of the property at time of patent. Is it ***at that time*** the more valuable for "its deposits of a mineral character," or for

agricultural or other uses? This is a question most fit for the Secretary's determination. Lands today included within the grant, as being more "valuable" for agricultural or other purposes would tomorrow, if the question remains forever open, be excluded as being "mineral lands;" and it is inconceivable that this question of comparative value was forever to be left open to determination, varying and differing from time to time with changes in transportation facilities, discoveries in arts and sciences, and the ever varying price of the materials comprised in the earth's crust.

To avoid misunderstanding we repeat that we are dealing with the specific question asked by the court below, whether a patent issued under the circumstances described *"operates to convey* lands thereafter ascertained to be mineral",—whether, as to such lands, it is *void*. Whether such a patent is *voidable* is, as we have seen, a very different question. Beyond all doubt such a patent might be avoided or canceled in a suit seasonably brought by the government, on a showing of fraud or imposition in its procurement or in its issuance. Whether the circumstances supposed in the court's question, of absence of "investigation," and absence of "hearing," would justify its cancelation, would depend on what is meant by "investigation" and "hearing." A case is perhaps conceivable (though it is difficult to see how it could arise in the absence of fraud) where the issuance of the patent was so demonstrably a leap in the dark as to justify a court of equity in canceling it in a suit brought by the government for that purpose; but a mere showing that a special examination of the particular land had not been made, or that a hearing as to its quality had not been had, would not make out such a case. The De-

partment has general information as to the character of the lands within its jurisdiction. The Surveyor General when making the survey (and, of course, this must be made before the land can be patented) is required to note whether they are agricultural or mineral. If in a given case the Department saw fit to act upon this alone, without further inquiry or hearing, a patent so issued could not be canceled even in a direct suit brought by the government for that purpose. Questions of fraud and imposition being out of the way the formal action of the Department cannot be recalled merely because the Departmental officers did not perform their duty well. This is expressly recognized in the passage above quoted from the *Barden* case, at page 330, as well as in the language of Chief Justice Marshall above qnoted from *Polk's Lessee v. Wendall, supra.*

Because of the suggestion, at page 330 of the opinion in the *Barden* case, that additional legislation should be enacted, Congress at its ensuing session passed the act of February 26, 1895 (28 Stat. 683) providing for the classification of lands within the mineral belt of the Northern Pacific grant. By section 6 the classification of the commissioners, provided for by the act, is made "final;" and section 7 provides that no patent shall issue to the Northern Pacific Company for any land within the belt until it shall have been examined and classified as non-mineral. If, as the Government now contends, the patent is not decisive of the non-mineral character of the lands, why did Congress enact this prohibition against its issuance until after their non-mineral character should have been ascertained?

The court's question suggests, however, the additional qualification of a "patent to a railroad company

under a grant which excludes mineral lands * * * which is issued without * * * *determination* of the quality of the lands." We submit, with deference, that this involves a contradiction in terms. The patent *is* the determination, and, when issued "under a grant which excludes mineral lands," it necessarily determines that the lands described in it are of the class which the patentee is entitled to receive. To speak of a patent as not determining the facts necessary to its proper issuance is as if one were to speak of a judgment as not determining the facts necessary to its rendition. The analogy between patents and judgments in this aspect is well recognized (*Noble v. Union River Logging Railroad*, 147 U. S. 165, 173); and as a judgment is decisive not simply of the ultimate facts recorded in it, but as well of all of the antecedent facts necessary to its rendition—of "all the *media concludendi*," (*Fauntleroy v. Lum*, 210 U. S. 230, 237)—so a patent is a determination not only that the patentee is the owner of the lands described in it but as well that they are the kinds of lands which may properly be conveyed to him.

Finally we think it not too much to say that the appellant himself is not opposed to the views we have expressed on this point, for, in discussing this Second Question in his brief (pages 35-38), he starts out by stating that "it is not the question in controversy;" and he proceeds to swing the discussion over to what he conceives to be the question in controversy by the introduction into it of facts or alleged facts extraneous to the court's question. We have assumed, that, as this court has declined to order the entire record brought before it, it will answer the questions as they stand, and so we have discussed them as they stand.

THIRD QUESTION: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

This question necessarily supposes that the patent to which it refers is valid, or, at worst, is only voidable. If it were supposed to be void it could, of course, grant nothing, and there being no grant there could be no exception; there would be nothing on which the exception could operate. It is not to be supposed that the Circuit Court of Appeals is inquiring as to the validity of an exception to a void grant.

The reservation and exception in question is as follows:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of statute shall not be construed to include coal and iron lands."

This exception was incorporated in all railroad land grant patents issued prior to 1903, when, at the request of the Northern Pacific Railway Company (32 L. D. 342), and because this court had held that there was no authority for its inclusion (*Deffeback v. Hawke*, 115 U. S. 392, 406; *Davis's Administrator v. Wiebbold*, 139 U. S. 507, 527; *Shaw v. Kellogg*, 170 U. S. 312, 337) the practice of inserting it was discontinued. We print the decision of the Secretary of the Interior upon the question as Appendix "A" of this brief.

By its language the exception plainly refers to mineral lands which shall *thereafter be ascertained* to be such; for, as Mr. Evarts says in his brief (page 50) "the words 'should any such be found' certainly do not mean 'which have been found.'"

That this exception is void *as being inserted in the patent without authority,* is shown so conclusively in Mr. Evarts' brief (pages 53-80) that we can add little.

It seems proper to submit, however, that from the necessities of the case, and apart from any question of authority to make it, such an exception in a conveyance is nugatory, (1) because repugnant to the grant, and (2) because uncertain; and that at common law it has always been so regarded.

(1) It is an old and well established rule that an exception repugnant to the grant is void. The rule is thus stated by Chancellor Kent (4 Kent Com. 468):

> "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed and void, if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grants two acres, excepting one of them. The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dovehouse; or in the grant of a piece of land, excepting the trees or woods; or in the grant of a manor, excepting a close, *ex verbo generali aliquid excipitur.* If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made.' "

And by Chief Justice Parker of Massachusetts in *Cutler v. Tuffts,* 3 Pick. 277:

> "An exception," says Lord Coke, 1 inst. 47a, "is ever a part of the thing granted, and of a thing

> *in esse,* as an acre out of a manor; that is, out of a *general* a part may be excepted, but not part of a certainty, as out of twenty acres, one. Now, in the case before us, the thing granted is certain, that is a moiety of a certain tract of land; an exception, therefore, of one-half of this moiety would be like a grant of twenty acres excepting one."

This is not a mere artificial rule of law. It expresses merely the conclusion compelled by a common sense view of an instrument containing contradictory provisions; and the rule is applied today as consistently as in the time of Coke (see *Devlin on Real Estate, Third Edition,* 1911, Section 979 and cases cited). An instrument which grants lot 1 and excepts lot 1 is either self destructive, in which event there is no explanation as to why it was executed, and no effect whatever can be given to it; or one of its contradictory provisions must be disregarded, and in order to give any effect whatsoever to the instrument the provision to be disregarded must be the excepting clause. And what is true where the excepting clause is as broad as the grant, is equally true where it is as broad as and repugnant to any distinct part of the grant, as, for instance, a grant of lots 1 and 3 excepting lot 3.

Now, that the exception in question is repugnant to the granting clause is plain. It is *potentially* repugnant to it from the moment of the execution of the patent—i. e. the lands, or some specified sections of the lands conveyed *may* thereafter be found to be mineral lands;—and of course it must be *actually* repugnant to the granting clause before its provisions can be invoked or relied upon.

(2) It seems equally clear that the exception is void for uncertainty. The rule is thus stated by a recognized

authority (*Devlin on Real Estate*, Volume 2, Page 1933, Third Edition, 1911):

> "If the land conveyed is described as an entire tract excepting a parcel described, and the description of the parcel in the exception is vague and uncertain, the uncertainty will affect the exception only, and that will fail and not the grant."

For the exception to be good it must be possible for any one with the instrument in his hands, and from information which it contains either actually or by reference, to go at once upon the lands conveyed and determine which lands passed from the grantor and which were excepted and retained by him. This the holder of a patent containing the excepting clause in question, of course could never do, because no one could say what lands might at some time hereafter be found to be mineral lands.

There are a number of California cases, of which *VanNess v. Rooney*, 160 California, 130, is perhaps the most recent, which sustain this exception by construing it as applying to lands which were ***known to be mineral*** when the patent issued. These cases in effect hold that a patent containing this exception says substantially this: "I, the patentor, grant to you, the patentee, sections three, five, seven and nine, excepting, however, those sections *which have been found* to be mineral." The argument is that lands may be known mineral lands even though not known to the patentor to be such; and that if they are identifiable ***in fact*** by any one at the time of the grant, an exception of them in this form is valid even though the grantor himself might not be able at that time to identify them. We submit that as applied to the exception before us this is unsound for the following reasons:

1. It assumes language to be descriptive of an actual existing fact which logically and grammatically can refer only to a hypothetical situation which may or may not arise in the future. As stated in the passage of Mr. Evarts' brief (page 50) which we have already quoted, the words "should any such be found" certainly do not mean "which have been found."

2. The exception, even when read as applying only to *known* mineral lands, creates, potentially at least, an exception as broad as the grant, because all of them may be known to *some one* to be mineral; and even *VanNess v. Rooney*, supra, concedes, apparently, that such an exception is void, the court saying:

> "If *all* are mineral lands it may be that the exception is void; but the fact cannot be assumed as by its terms the exception is limited to such as are mineral lands, and does not *necessarily* extend to all the tracts granted."

No, it does not "necessarily" extend to all the tracts granted, but it *may* extend to all of them; and if the rights of mineral claimants had been recognized in nine sections it is difficult to see what answer could be made to the mineral claimant asserting exactly the same right to the tenth and last section covered by the same patent.

It is to be observed, moreover, that, even if sound, the doctrine of these cases is applicable only to lands which were *known* to be mineral previous to the issuance of the patent; and as there is much uncertainty as to what is meant by the term "known mineral land," unless that term shall be held to apply only to land which was not only mineral land in fact but which had been *formally claimed as such*, in proceedings of which there was *record evidence*, the doctrine

would render all railroad land grant titles utterly insecure. It would be open for any one, at any time, to say that a particular tract fell not within the grant but within the exception, and to support this contention by a mere oral showing that, previous to the issuance of the patent, *some one* knew it to be mineral land.

FOURTH QUESTION: If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with.

Clearly the question must be answered in the affirmative. The exception in the patent being *void* (as the question supposes), and the patent being at worst only voidable, the authorities are uniform upon the proposition that it is conclusive against a collateral attack.

Polk v. Wendall, 9 Cranch. 87, 97;
Johnson v. Towsley, 13 Wallace, 72, 83;
French v. Fyan, 93 U. S. 169;
Smelting Co. v. Kemp, 104 U. S. 636, 640;
Steel v. Smelting Co., 106 U. S. 447, 451;
Doolan v. Carr, 125 U. S. 618, 624;
Chandler v. Mining Co., 149 U. S. 79, 92;
Heath v. Wallace, 138 U. S. 573, 585;
McCormick v. Hayes, 159 U. S. 332, 348;
Burfenning v. Railway Co., 163 U. S. 321, 323.

SIXTH QUESTION: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Unquestionably it does. Of course, if there is in the patent a valid exception of certain lands, that is one thing. In that view the lands so excepted were never touched by the patent. They stood, the day after its issuance, precisely as they stood the day before its issuance. They were public lands of the United States, and any claimant was free to locate them under the mining laws without "attacking the patent" at all. The suggestion of a necessity for attacking the patent implies that the patent gave to the patentee some legal rights in them; and if that is so those rights would necessarily override any possible "equitable" right which might thereafter be acquired in them by location or by any step which a mineral claimant might take. The cases uniformly hold this.

Bohall v. Dilla, 114 U. S. 47;
Sparks v. Pierce, 115 U. S. 408;
Lee v. Johnson, 116 U. S. 48;
Sanford v. Sanford, 139 U. S. 642;
Ehrhardt v. Hogaboom, 115 U. S. 67;
Quinn v. Chapman, 111 U. S. 445.

ANSWER TO BRIEF FILED ON BEHALF OF THE UNITED STATES.

The main contention of the railroad companies is that when, under a railroad land grant, the Government issues to the grantee company a patent covering section one, that is a determination that section one is a section which, under the grant, the company is entitled to receive; and that if there has been no fraud or imposition or mistake that determination is conclusive.

The main contention of the Government in its brief, on the other hand, is that while this is so of a patent issued under the general public land laws, it is not so of a patent issued under a railroad land grant; that a railroad grant proceeds directly from Congress; the patent adds nothing to it; and it is not the function of the patent to define the limitations of the estate granted. Counsel for the Government say:

> "It is understood that in the present case the railroad company contend that the patent constitutes a conclusive adjudication that the lands therein described are non-mineral.
>
> The contention of the railroad company upon this question is founded upon the false premise that the presumptions applicable to patents issued under the general public land laws are also applicable to patents issued under direct grants from Congress, including railroad grants, whereas there is a fundamental distinction between these two classes of patents, which denies the application to the latter of the presumptions attending the former."

And again:

> "The principal purpose of a railroad patent is to furnish record evidence that the lands have

> been earned by construction of the railroad, and are not subject to forfeiture for breach of the condition requiring construction of the railroad; also that the lands described in the patent are odd-numbered sections within the exterior boundaries of the grant, and are situated opposite to and coterminous with a completed section of the railroad that has been accepted and approved."

And again:

> "Conceding that the patent involved in this case is a conclusive adjudication that the lands therein described were earned by construction of the railroad, and that the conditions of the grant have been performed as to those lands, and that the lands described are odd-numbered sections within the exterior boundaries of the grant, will it be contended that the effect of the patent as an adjudication of those facts (*which is the only effect that the patent can have*) is in any way impaired because the Secretary of the Interior did not also adjudicate the character of the land?"

It will be observed from the foregoing that counsel for the Government are at least consistent in their argument. They carry it to its logical conclusion. Mineral lands are not the only lands excepted from the grant. Lands to which any homestead claim, or any pre-emption claim, or any other claim, had attached at date of definite location, or which were then occupied by homestead settlers, are also excepted from it. Obviously if the patent is not decisive that the land is not excepted as being non-mineral, neither can it be held to be decisive that the land is not excepted as being within some one or other of the remaining excepted classes. Counsel meet this difficulty squarely. They say the patent *is not* decisive of either of these questions; and that when the Southern Pacific Rail-

road Company receives from the Government a patent covering section one *"the only effect that the patent can have"* is to say to the world that the Southern Pacific Railroad has been built, that section one "is an odd-numbered section," and that it lies within the exterior boundaries of the grant. If any one wishes to purchase the lands from the patentee, he takes them subject to the risk of losing them at any time on a showing that they were in one or the other of the excepted classes.

If this is the only information which the patent imparts, it is difficult to see why the Department should go to the trouble of issuing it; for the world knows, as courts know judicially, that the Southern Pacific Railroad has been built and accepted, and that the sections described in Southern Pacific patents are odd numbered sections, and whether or not they lie within the exterior boundaries of the grant. A patent which conveys only this information therefore, is of no value whatsoever; and it does not take the first step towards performing its primary function under the granting Act. Under section 4 of the Act, patents were to issue *"confirming* to said company the right and title to said lands;" and how can an instrument be said to *confirm* a title when it imports nothing save what is notorious, and leaves the title subject to collateral attack upon a dozen different grounds?

We submit that the contention of the Government in this respect is made in the very teeth of the decisions of this court. We believe that it has never been decided (certainly counsel cite us to no decision) that *"the only effect"* of a railroad land grant patent is the narrow one which counsel ascribe to it; nor has this court ever drawn any such distinction as the Government contends for between such a patent and a patent

under the general public land laws. It is not to the latter class of patents alone that the courts have ascribed a conclusive character. On the contrary, it has been of railroad land grant patents that the courts were speaking when some of the strongest expressions as to their conclusiveness were used. We quote some of these expressions below:

Barden v. N. P. R. R. Co., 154 U. S. 288, 327.

> "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

Wisconsin Central Railroad Co. v. Price Co., 133 U. S. 496, 510.

> "They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; *they would have obviated the necessity of any other evidence of the grantee's right to the lands;* and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government."

St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, 6.

> "There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands

as coterminous with the completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. *They would also obviate the necessity of any further evidence of the grantee's title.*"

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251.

"While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; *they would obviate the necessity of any other evidence of the grantee's right to the lands,* and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government."

Lake Superior, etc., Co. v. Cunningham, 155 U. S. 354, 375.

"That case (the *Barden* case) fully illustrates the extent to which the rule goes. The grant to the Northern Pacific was of lands 'non-mineral,' and it was held that it was a question of fact whether lands were mineral or non-mineral, and that question of fact was for the determination of the Land Department, *and when determined by it, conclusively settled.*"

Shaw v. Kellogg, 170 U. S. 312, 339.

"Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral,

did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, *but that division was only as to the time at which and the means by which the non-mineral character of the land was settled.* The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent *—it passed free from the contingency of future discovery of minerals."*

U. S. v. Winona & St. P. R. R. Co., 67 Fed. 948, 957. (Opinion by Judge Sanborn).

"On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroad or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, *the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack."*

If there is ground for the distinction which the Government draws between railroad grant patents and

patents under general land laws, the *Barden* case would have been pre-eminently the place in which to point it out. Yet Mr. Justice Field, instead of drawing any such distinction, accentuates their identity in legal effect, by quoting what the court had said of the conclusiveness of patents of the latter class, in support of what he says of railroad grant patents. And he quotes with approval, the language of Secretary Noble in *Central Pacific Railroad Co. vs. Valentine*, 11 L. D. 238, 246, where, *speaking of a railroad land grant patent*, the Secretary says:

> "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the offcers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of

policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property."

Again, the decisions of this court regarding patents issued under the swamp land acts show the unsoundness of the Government's contention. The swamp land grants, like the railroad grants, were grants *in praesenti;* and it has been held that the right of the States to the lands granted by them could not be defeated by failure to issue patent. Thus in *Wright v. Roseberry,* 121 U. S. 488, 499, it is said:

> "The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the swamp land act—'there is hereby granted.' Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. * * * It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made."

If the Government is consistent, therefore, it must argue that a patent under the swamp land act is not conclusive that the land covered by it *is* swamp land.

Except as to the description of the land granted the granting clause of that act is, in legal effect, the same as the granting clause in the railroad acts. The swamp act says that "swamp and overflowed lands are hereby granted"; and the railroad act says, in effect, that non-mineral lands are hereby granted; because of course a grant of "lands not mineral", or a grant of lands, excepting mineral lands therefrom, is exactly tantamount to a direct grant of *non-mineral lands;* and this is analogous, as the court says in *Wright v. Roseberry, supra,* to a direct grant of swamp lands; and there is exactly the same necessity for the Department to determine that railroad lands are *non-mineral* before issuing patent to them, as there is to determine that lands granted to the States under the swamp acts are *"swamp."* If, therefore, the Secretary's patent under the swamp land act is conclusive that the lands patented are swamp lands, the same reasons exist for holding it to be conclusive as to the *non-mineral character* of lands patented under railroad grants; and it is well settled that swamp land patents are conclusive as to the character of the land patented. Thus in *Wright v. Roseberry, supra,* it is said at page 300:

> "When identified, the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. *It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list.* The determination of the Secretary upon these matters, as shown by the patent, *would be*

> *conclusive as against any collateral attacks,* he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue."

See also *French v. Fyan,* 93 U. S. 169.

Again, the identity, in legal effect, of the patent issued under a railroad grant, with a patent issued under the homestead or pre-emption acts, is shown by the numerous cases in which, because of rights established by the homesteader or pre-emptioner previous to the issuance of the patent, it has been declared that the patent title granted to the railroad company was held in trust for the party thus entitled to it under general laws. According to the Government's contention this patent, as having been issued under a railroad grant, was conclusive of nothing except certain notorious facts—the construction of the road, the odd number of the section granted and its location within the boundaries of the grant. Yet this is the only title which the homesteader or pre-emptioner gets; and was it ever asserted by anyone that the title thus established was not exactly as good, and exactly as conclusive against collateral attack, as if the patent had been issued to him directly under the homestead or pre-emption act?

There is another difficulty in which the Government is involved by its argument and to which attention should be called. Beyond all question the railroad grants contemplated that lands might be selected within the indemnity limits, in lieu of those lost within the place limits because falling within some one or other of the excepted classes. But how could it be determined whether any lands had been lost within the place limits, unless it was contemplated by Congress that there should be a determination by the Land Department that they did or did not fall within one or other of those classes? According to the Government's contention this question remains open for all time. The Railroad Company could not say "We select this section within the indemnity limits in lieu of that section which we have lost within the place limits"; for the answer would be, "You don't know whether you have lost it or not; it may never be ascertained to be mineral or to have fallen within any of the excepted classes, and you may be allowed to keep it." Meanwhile the lands within the indemnity limits would be taken up, (because of course the Railroad Company has no rights in them until selection, and anyone can enter them in the meantime, *Oregon & C. R. R. Co. vs. United States,* 189 U. S. 103), and the provision for the selection of indemnity lands becomes a solemn mockery. It becomes a statement to the effect that "You can have other lands in lieu of those falling within the excepted classes; but you will never know whether they fall there or not."

Counsel for the Government do not discuss what is said in the *Barden* case to the effect that the patent is conclusive as to the non-mineral character of the land; but in the brief filed on behalf of appellants Lamprecht and Aiken, it is contended that what is said on this point in that case is *dictum*. But the authority

of that case upon this point cannot thus lightly be swept aside. It is true that in that case no patent had issued and it was not necessary for the court to determine what the effect of a patent would be. But as we have pointed out above, the question in which the entire controversy centered was as to when and how it should be taken as definitely settled that the railroad company did or did not have full title to the odd numbered sections lying within the place limits of its grant. This question having been thus fully presented and decided, the decision is of controlling authority even though the case might have been disposed of without any reference to it; for as said by this court in *Railroad Companies v. Schutte,* 103 U. S. 118, 143:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

That the decision in the *Barden* case has not been commonly regarded as *dictum* is apparent from the following decisions since rendered where it is treated as of controlling authority upon this very point:

Toltec Ranch Co. v. Cook, 191 U. S. 532, 541.
Lake Superior Ship Canal v. Cunningham, 155 U. S. 354, 375.
Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166.

Central Pacific R. R. Co. v. Nevada, 162 U. S. 512, 525.
Shaw v. Kellogg, 170 U. S. 312, 339.
U. S. v. Ry. Co., 160 Fed. 818, 820.
Le Marchel v. Teagarden, 152 Fed. 662, 666.
James v. Germania Iron Co., 107 Fed. 597.
U. S. v. Ry. Co., 148 Fed. 891.
Boynton v. Haggart, 120 Fed. 829.
Cosmos Co. v. Gray Eagle Co., 104 Fed. 47.

It is to be observed, finally, that in any aspect of the Government's argument it can apply only to *place* lands. As we have said the basis of that argument is that the Act of Congress itself grants the title, upon identification of the odd-numbered sections by definite location of the road; but this is true only of lands within the place limits. Title to lieu lands, or to lands within the indemnity limits, is dependent absolutely upon the Secretary's approval of the selection made. Upon his approval title takes effect by relation from the date of selection; and in giving his approval and issuing patent he must necessarily decide that the lands selected and patented are not within the excepted classes. *Weyerhaeuser v. Hoyt*, 219 U. S. 380, and cases there cited.

The Government's discussion of the Third Question carries throughout a kind of implication that the Department has never pretended to make any inquiry as to the mineral character of the lands patented, and that it has relied upon the excepting clause to prevent title to mineral land from vesting in the railroad grantee. This implication is directly opposed to the fact. We believe it to be the simple truth to say that the Department throughout has made that investigation and inquiry which has been thought necessary. This would be more or less searching and extended according as the land lay in closer or more remote

proximity to known mineral regions. This is apparent from the account given in the Secretary's decision in 1903 of the proceedings before the land department had upon lists and selections made under railroad grants. That decision is printed in full as Appendix "A" of this brief but we quote from it the following passage:

> "All such lists and selections are required to be filed in the local land office of the district in which the lands are situate and are, by the officers of that district, carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894, (19 L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list are eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this Department for approval and, upon such approval, the patent of the United States issues."

It will thus be seen that the insertion of this excepting clause was not prompted by a consciousness that no steps had been taken to ascertain whether the lands were mineral or not. Indeed the Secretary continued to insert it in the Northern Pacific patents down to

1903, notwithstanding the fact that after the Act of February 26, 1895 (28 Stat. 683), he issued no patents to the Northern Pacific Company covering lands in the mineral belt until after they had been examined and classified as non-mineral by the Commission provided for in that Act. After 1903 the exception was omitted until the early part of 1911.

In the brief filed on behalf of appellant Burke it is said (p. 168):

> "It may be noted in passing that, 1911, the secretary of the interior, acting under the advice of the department of justice, reversed the ruling of Secretary Hitchcock by returning to the practice of inserting the mineral exception in railroad patents."

This passage suggests that the Attorney General was of opinion that the excepting clause was valid. The exact opposite of this is the fact. We quote his opinion in full as Appendix "B" of this brief, showing that he was very clearly of the opinion that it was void, and that he suggested its insertion in the patent merely for the purpose of testing the question. The Secretary of the Interior, as a precautionary matter, has adopted his suggestion, and is now inserting the exception in patents now issued. Had counsel for the Northern Pacific Railway Company believed that *mandamus* would lie they would have pursued the course suggested by the Attorney General, and would have sought to compel the issuance of patents without the excepting clause; but as it was believed that *mandamus* would not lie (*Ness v. Fisher*, 223 U. S. 683) that company has accepted, under protest, such patents as have issued containing the excepting clause, pending the determination of the question in this litigation.

Counsel for the Government say:

"The Supreme Court of California has uniformly held that exceptions of mineral lands inserted in railroad patents are valid."

In support of this proposition they cite the six following cases:

McLaughlin v. Powell, 50 Cal. 64;
Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194;
Carr v. Dingley, 57 Cal. 395;
McLaughlin v. Heid, 63 Cal. 218;
Gale v. Best, 78 Cal. 240;
Van Ness v. Rooney, 160 Cal. 131.

Three of the cases cited, (*McLaughlin v. Powell, Chicago Quartz Mining Co. v. Oliver*, and *Van Ness v. Rooney*) do indeed sustain the exception; *but only as to known mineral lands.* In every one of those three cases there were *known* mineral claims of record before the issuance of the patent to the railroad company.

The three remaining cases cited by counsel to this proposition (*Carr v. Quigley, McLaughlin v. Heid* and *Gale v. Best*) do not support it in the slightest degree and we are at a loss to understand why counsel have cited them. *Carr v. Quigley* and *McLaughlin v. Heid* have nothing whatever to do with mineral exceptions to a grant, but present merely the question whether lands reserved, as being claimed under a Mexican grant, could accrue to a railroad grantee; and in *Gale v. Best*, the patent contained no mineral reservation whatsoever and the railroad company's title was sustained.

Counsel for the Government say:

"The theory upon which the California decisions have been rendered is that the exception is a part of the description of the lands covered by the patent. And this view seems to be sound."

If language which clearly looks to the future can be treated properly as referring to an existing condi-

tion, it may indeed be said that it is "sound" to treat the exception as a part of the description for the purpose of excepting *known* mineral lands. But that is as far as the theory can be carried. It cannot possibly be applied to *unknown* mineral lands. The unknown cannot be made descriptive of anything, nor can it possibly be described.

Counsel for the Government refer to the decisions holding that in placer patents it is proper to insert an exception of *known* lodes, and they say:

> "The decisions in the cases just cited are strictly analogous to the case at bar. What difference does it make that in those cases the exception was of 'known' lodes?"

It makes the "difference" between a good description and a bad one. If the exception in this case could be treated, in spite of its language, as referring to an *existing known situation,* it would be certain, or susceptible of being made certain, and the grantee could determine at once what had been granted and what had been withheld. But a grant of section one, excepting so much of it as may *at any time in the future* be ascertained to be mineral, is as if a man were to grant section one, excepting so much of it as at any time thereafter he might desire to keep. The question how much of it he might at any time thereafter desire to keep is as susceptible of definite ascertainment as is the question how much of it may at any time in the future be found to be mineral. Such an exception renders the instrument not a conveyance but a travesty, and to sustain it is to deprive the patent of all its effect.

CHARLES W. BUNN,
CHARLES DONNELLY.

APPENDIX "A."

RAILROAD GRANT-PATENT-EXCEPTION OF MINERAL LANDS.

NORTHERN PACIFIC RAILWAY CO.

There is no authority for the insertion, in patents issued under railroad land grants of the clause, "excepting all mineral land, should any such be found in the tracts aforesaid;" and directions are given that in all future railroad land grant patents said excepting clause be excluded.

Secretary Hitchcock

To the Commissioner of the General Land Office,

(F. L. C.) December 10, 1903. (F. W. C.)

The Department has considered the request by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, that you be instructed to eliminate the following clause from patents issued under its land grant, namely:

> yet excluding and excepting all mineral land should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be held to include iron or coal lands.

In reporting upon said request your office letter of December 11, 1901, states that it is questionable whether there is authority for its insertion, but that—

> this excepting clause has always been introduced into the patents issued to the company which now cover millions of acres of its grant, and this has also been done in the patents issued under all other railroad land grants having a like excepting clause.

MINERAL LANDS EXCEPTED.

All mineral lands, other than coal and iron, are excluded from the Northern Pacific land grant, whether known or unknown at the time of the attachment of rights thereunder, either by definite location or selection. *Barden v. Northern Pacific R. R. Co.* (154 U. S. 288).

WHO SHALL DETERMINE THE CHARACTER OF THE LAND WITHIN THE LIMITS OF A RAILROAD GRANT?

The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the land department. In *Litchfield v. Register and Receiver* (9 Wall. 575, 577) it was said:

> The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion.

In *Steel v. Smelting Company* (106 U. S. 447, 450, 455) it was said:

> We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the sub-

ject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *Burfenning v. Chicago, St, Paul, etc.* (163 U. S. 321, 323) it was said:

> Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 62; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332.

In *Northern Pacific R. R. Co. v. Sanders*, (166 U. S. 620, 635) it was said:

> Whether the lands sought to be purchased as mineral lands were of that character was a matter for the determination, in the first instance, of the

> land department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands.

In *Barden v. Northern Pacific R. R. Co., supra* (pages 328, 329), it was said:

> If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent.

These cases clearly establish the jurisdiction of the land department in the premises.

PROCEEDINGS BEFORE THE LAND DEPARTMENT HAD UPON LISTS AND SELECTIONS MADE OF LANDS UNDER A RAILROAD LAND GRANT PRECEDING THE ISSUE OF PATENTS THEREON.

All such lists and selections are required to be filed in the local land office of the district in which the lands are situate and are, by the officers of that district, carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894 (19 L. D. 21), they are again thoroughly examined in connection with the

records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list are eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this Department for approval and, upon such approval, the patent of the United States issues.

ISSUE OF PATENT FOR LANDS UNDER A RAILROAD LAND GRANT DETERMINATIVE OF THE CHARACTER OF THE LANDS PATENTED.

As before shown, it is the duty of the land department to determine primarily the character of the lands within the limits of all railroad land grants and the usual rule fixing a time for the attachment of rights under such grants does not estop inquiry into this matter by that department. When, however, the land department, charged with this duty, and after due investigation of the matter as provided for by its rules and regulations, patents lands as falling within the terms of these grants, such action is necessarily determinative of the character of the lands patented.

EFFECT OF SUCH DETERMINATION.

When the law has confined to a special tribunal the authority to hear and determine certain matters, its

determination, in the absence of fraud, is conclusive upon all others. *Johnson v. Towsley* (13 Wall. 72, 83).

In the case of *Barden v. Northern Pacific R. R. Co., supra,* the court (pages 330 and 331) states that—

> It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard of their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive proceedings respecting the title.

In certain cases involving the question as to the character of lands claimed under the grant made to

the States of swamp and overflowed lands, the courts have permitted the introduction of oral evidence to determine the character of such lands, but these cases are carefully considered in the case of *McCormick v. Hayes, supra,* where it is said by the court (page 342 of its opinion):

> There is in this case no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the Secretary *had made any decision,* the evidence would have been excluded.

It follows that, in the absence of fraud, the determination effected by the issue of patent as to the character of the lands patented is conclusive, and that the insertion of the clause hereinbefore referred to is without effect and can serve no good purpose.

EXCEPTIONS CONTAINED IN LETTERS PATENT OF THE UNITED STATES.

It has been shown that it is as much the duty of the land department to determine whether lands are excepted from a railroad land grant because mineral in character, as it is to determine whether they are excluded because embraced in some other term of exception found in the granting act, that the issue of patent under such a grant is a determination that the lands patented are of the character granted, and that in the absence of fraud such determination is conclusive.

Why, then, should one term of exception be carried into the patent when all others are excluded?

In *Davis v. Weibbold* (139 U. S. 507) the question as to the effect to be given to excepting clauses found in patents issued under acts of Congress providing for the disposal of public lands, was fully considered

by the court, and on pages 527-528 of its opinion it was said—

> But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the land department, resting for their fitness only upon the judgment of those officers. *Deffeback v. Hawke,* 115 U. S. 392, 406.

In *Deffeback v. Hawke* it was said:

> The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.

There is clearly, therefore, no warrant for the insertion in patents, issued under the railroad land grants, of the clause "excepting all mineral land should any such be found in the tracts aforesaid." If any statement in this connection were deemed necessary in the patent, which is not believed to be the case, it should be to the effect that the lands patented are found to be non-mineral in character and otherwise subject to the grant.

The letter from the railway company, now under consideration, in referring to said excepting clause, states that—

> Whilst its inclusion cannot in law lessen the title acquired by the company, it can and frequently does induce innocent third parties not well versed in the law to engage in vexatious and expensive litigation in the belief that there may be excepted from the patent to the railroad company any minerals which shall be found in the patented lands thereafter.

After careful consideration of the matter, therefore, the request is granted, and you are directed, in future, to exclude said excepting clause from all railroad land grant patents.

APPENDIX "B."

DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY-GENERAL
WASHINGTON, D. C.

"W. A."
153972-46 March 29, 1911.

The Honorable,
The Secretary of the Interior.

Sir:

Judge Ross, in the United States Circuit Court for the Southern District of California, has handed down a decision in the case of *Roberts* against *Southern Pacific Company*, a copy of which I enclose for your information. This is the case concerning which there has been some correspondence between your Department and mine, arising out of the land grants to the Southern Pacific Railroad Company and the construction of the exception incorporated in the patents issued by the Interior Department prior to 1903, in the following language:

> "Yet excluding and excepting 'all mineral lands' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land' ".

The Court in effect holds (first) that it was the duty of the Secretary of the Interior to ascertain prior to the granting of patents whether or not the lands selected were mineral lands, and that, having reached the conclusion that they were not, that conclusion, in the absence of fraud was final. This construction of the act is undoubtedly fortified by the provisions of

the act of July 27, 1866 (14 Stats., 292), Section 3, which, among other things, provides:

> "That all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

In other words, if the lands originally selected are found to be mineral lands, the railway company is given the right of alternative selection over other unoccupied agricultural lands. Obviously this privilege might be entirely lost if because years after a patent was issued, petroleum or some other mineral substance, should be found to exist in lands granted by patent pursuant to the original selection the grant should fail, and in the meantime all agricultural land from which selection might otherwise be made should have been taken up by other entrymen.

The Court holds that it was not competent for the Secretary of the Interior to insert the continuing "floating" exception of the character above quoted which should attach to the land if in the future it should be found that the land was mineral in character. As a matter of fact the language of the exception is ambiguous. It might possibly be construed to apply to the present or to the future; that is, the Secretary of the Interior, without making any investigation, might have intended by this exception to reserve from the operation of the grant any lands which at that time were known or at any future time should prove to be mineral lands; or it might be that having made an investigation and being unable to find that any of the lands were mineral in character, he attempted to protect the interests of the Government against the future

discovery of mineral by using this language for the purpose of excepting from the operation of the grant tracts of land in which subsequently minerals might be discovered.

The reasoning of the Court in respect to the legality of this practice seems to me to be conclusive. Congress granted in aid of the construction of the railroad, certain sections of public land, not mineral, and authorized the company to select the lands under the direction of the Secretary of the Interior, and upon completion of sections of railroad for service, that patents should issue to the company, confirming to it the right and title to said lands. The purpose of this grant was to encourage and assist the railroad company to construct its lines. Obviously if the estate granted was incumbered with a "floating" indefinite species of condition subsequent, its market value would be greatly impaired.

Of course, it may be said that if the contention that all mineral lands are excluded from the operation of the grant and the patents, then mineral lands are not part of the granted estate, and the expression of an exception cannot operate to impair it. It is not unusual for large areas of land to be granted reserving to the grantor all land of a particularly designated character within its boundaries; e. g., timber lands, saline lands, etc. In such cases it is the duty of the grantee to ascertain for himself what lands fall within the exceptions.

Upon the representation to the Interior Department that the Southern Pacific Railway Company had received patents to a considerable amount of lands which had been found to be mineral in character, and in view of the question which was mooted in this Roberts suit, your Department decided some months ago to

withhold the issue of any patents to the Southern Pacific Company. It would seem to me that since this decision above referred to, there is no substantial reason why the issuance of future patents should be upheld.

The further question, however, arises upon which you asked my opinion some time since; namely, whether or not the patents to be hereafter issued should contain an exception similar to that above quoted, which was the practice of the Department prior to 1903, or should contain such an exception. If Judge Ross' opinion is sound, as I believe it to be, it would not be proper to insert an exception in a deed; but if any exception is inserted it should be clear and not ambiguous. I am advised that the Roberts case will be appealed to the Circuit Court of Appeals, and it is, of course, possible that the Court of Appeals may take a different view of the case, although I think it most improbable. But if you should deem it best to guard against any possibility of a different view being taken by the Court of Appeals from that expressed by Judge Ross, you might during the pendency of the appeal and until the case is finally decided, issue patents containing an exception which would clearly except from the operation of the grants "All lands mineral in character now known or hereafter discovered to be such". Possibly if you tendered to the Railway Company a patent in that form they might apply to the Court to mandamus the issuance of a patent without the exception, which would bring squarely before the Supreme Court of the District of Columbia the right of the Secretary of the Interior to insert such a clause in the patent.

I make this suggestion merely out of an abundance of precaution and in order to suggest a method of

affording absolute protection to you from taking any action which may fail to fully protect the interests of the United States in the premises.

Respectfully,

(Signed) GEO. W. WICKERSHAM,

Attorney-General.

Enc. 7972.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 682.

EDMUND BURKE, APPELLANT,

v.

SOUTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES FOR PERMISSION TO FILE A BRIEF AND PARTICIPATE IN THE ORAL ARGUMENT OF THE CAUSE AND FOR ADVANCEMENT OF THE HEARING.

The Solicitor General, on behalf of the United States, moves that the United States be granted permission to file a brief and to participate in the oral argument of this cause, and that this cause be advanced for hearing at some date not earlier than January 1, 1913, for the following reasons:

Decision of the questions certified to this court will necessarily determine whether the patent directly involved, or any similar patent, is, in law, effective to pass title to certain lands notwithstanding the fact that some or all of such lands are mineral lands of a character forbidden to be granted

by the very acts of Congress under which such patent is issued, and notwithstanding the existence in the patent itself of a provision purporting expressly, but without particular designation of tracts, to except all mineral lands, should any be found, from the premises granted.

Under the act of July 27, 1866, 14 Stat., 292, and the joint resolution of June 22, 1870, 16 Stat., 382, patents have heretofore been issued to and accepted by the Southern Pacific Railroad Company containing such express exceptions of all mineral lands (exclusive of iron and coal), but including in their general description many thousands of acres of land now known to be chiefly valuable for the deposits of petroleum therein contained.

The railroad company and its successors in interest now claim title to all these lands, notwithstanding the exceptions contained in the patents, asserting that the exceptions are inoperative and void.

The Government, on the other hand, believing the exceptions to be valid, holds that all such lands are the property of the United States, and is preparing in the near future to institute in the District Courts appropriate legal proceedings for the purpose of vindicating its claim and of securing an accounting for large quantities of oil which have been extracted from the lands without its consent. These petroleum lands are of immense value, and the right of the United States thereto

and of its citizens to make entry and purchase thereof under the general mining laws, are matters of much public importance, particularly in the State of California, where the lands are situated.

Analogous questions exist in respect of lands which are known, or reasonably believed, to be mineral and not intended to be granted, but which are included within the general descriptions of numerous patents heretofore issued to the Northern Pacific Railway Company, and other railway corporations, under railway aid provisions similar to those above referred to. All such patents contain exceptions identical with or substantially the same as the exception contained in the patent involved in the case at bar.

It is thus apparent that a decision by this court of the questions now before it by certification will be determinative of or may seriously affect the rights of the United States in regard to a subject matter of very serious importance and of the duties of its executive officials in respect of past and future transactions related thereto.

Notice of this motion has been served upon counsel representing the parties to the cause.

Respectfully submitted.

WILLIAM MARSHALL BULLITT,
Solicitor General.

October 14, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

Nos. 682 and 683.

EDMUND BURKE, *Appellant*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN Trading and Oil Company, *Appellees*.

J. I. LAMPRECHT AND F. M. AIKEN (TRUSTEES), *Appellants*,

v.

SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), Kern Trading and Oil Company (a corporation), and T. S. Minot, *Appellees*.

ON CERTIFCATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The facts involved in this case are few and simple. They are clearly stated in the certificate of the court below, and restated in the briefs filed by the opposing

parties. They need not be stated here again. The Government sought and obtained leave to file a brief in the case because, in the decision of the questions at issue, there is or may be involved the existence of property rights of enormous value, which are claimed by the United States.

To protect those interests, a suit has already been begun by the government in the southern district of California. Other like suits are in immediate contemplation. Under these circumstances, it is believed to be now the duty of the government not merely to present its contentions concerning the questions of law propounded in the certificate, but also, to a certain extent, and in a general way, to indicate certain matters of fact, which the government expects to establish and rely on in its suits, but which are either omitted or imperfectly supplied by the present record. Such matters (except where subjects of judicial notice), will of course be understood as presented here merely to illustrate the nature and public importance of the general subject-matter which may be affected by the court's opinion when rendered, without, of course, the slighest desire or expectation that they will be considered as facts of the record for the purpose of adjudicating this particular controversy.

Some 125,000 acres of valuable mineral lands are thought to be included in the general descriptions of patents precisely similar to the one here in controversy, which were heretofore issued to the defendant railroad company. The Government claims that by

virtue of the exception in the granting act of July 27, 1866 (14 Stat., 292, secs. 3 and 18), and joint resolution of June 28, 1870 (16 Stat., 382), and the repetition thereof in the patents, all these lands, as well as many others, now claimed by other railroad companies under similar conditions, are its property. The value thus involved is believed to be enormous, and the effect of the decision in this cause upon the Government's claim may prove to be vital.

Before proceeding to the argument, we should point out that the letter printed in the railroad company's brief as "Appendix D" is not an opinion of the Attorney General, and that its publication was never authorized or intended by him. The Government's appearance in this cause, and the initiation of the suit already begun by it, is a sufficient evidence of the present attitude of the Department of Justice, if that be material.

FIRST QUESTION.

Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

This exact question was elaborately discussed by this court in the case of *Barden* v. *Northern Pacific Railroad Co.*, 154 U. S., 288. It was there determined that the grant to the railroad was *in praesenti*, that the grant operated to transfer only nonmineral lands to the railroad; that it would be an indefensible extension of the grant to limit the exception of mineral lands to "known" mineral lands, no matter

at what time they should become so known; that the grant should be construed against the grantee; that a patent, reciting that the lands enumerated therein are nonmineral, and containing no exception of mineral lands, would constitute *res adjudicata* as to the character of the lands; but that, except through the medium of such actual adjudication, title to lands actually mineral in character never could pass under the grant to the railroad, and even in that event only because the patent showed an actual judgment that the lands were nonmineral.

The face of the grant, together with the thorough reasoning in the *Barden* case, will not allow further discussion of this question.

SECOND QUESTION.

Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the lands, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

The original grant excepted from its operation all mineral lands. The patent before the court neither exceeded nor fell short of the terms of the grant. It accurately fulfilled them by excepting from its operation all mineral lands. Neither through the grant nor the patent has any title to mineral lands gone out of the United States, or to the railroad company. But in the question now presented

it is asked whether, without considering the exception in the patent, the Land Department had power under the grant to pass title to lands mineral in character, before making a finding that the lands were nonmineral. This presupposes an intention or willingness so to do on the part of the Land Department, and it will always be remembered that the exception in the patent effectually negatives any such disposition.

The question has a dual aspect:

1. Whether the Executive has power to alter and enlarge the terms of a grant.

2. Whether the patent, though incapable of altering or affecting the grant, is a conclusive adjudication that the lands enumerated in the patent are nonmineral, even though there was no finding nor actual determination of that question, and even though the patent fails to show by its recitals any such determination. (The exception of mineral lands of course shows exactly the contrary.)

(*a*) It was definitely and finally decided in *Barden* v. *Northern Pacific Railroad Co.*, *supra*, that the firm intention of Congress was to reserve all mineral lands to the United States, without regard to the time at which their character should become known; in other words, no title to mineral lands passed by the *grant*. The court then says that the Land Department has the right to determine what lands are or are not mineral—and of this, more later—but until such determination is made there is no method

provided by Congress by which title to lands actually mineral may pass to the railroad. Even in this event it is only through the error of the Land Department in its judgment that title may pass. Very different is the question arising under a supposed attempt by the Land Department to transfer title to great bodies of mineral lands, either knowing that they are mineral, or without making any examination to determine. In that event the patent usurps a function beyond the mere deed of further assurance which it is intended to be in the case of railroad and similar grants (*Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 251;[1] *Langdeau* v. *Hanes*, 21 Wall., 521, 529),[2] and assumes to itself the character of an original convey-

[1] "While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the Government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession" (p. 251).

[2] "In the legislation of Congress, a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation."

ance independent of the legislative grant upon which it must depend for its validity. Thereupon the Executive will becomes substituted for the legislative, and the patent, if it purports to convey land against the will of or without authority from Congress, violates Article IV, section 3, of the Constitution, and is void. *Davis's Admr.* v. *Weibbold*, 139 U. S., 507. So here there was no authority to transfer title to mineral lands, known or unknown, and no attempt by the Land Department to do so could be successful, except on the theory that a decision had actually been made, as hereinafter discussed.

(*b*) It is contended that, though the Land Department is without power to alter the terms of the grant, nevertheless the patent, (or the issuance of the patent), constitutes a conclusive judgment by an authorized tribunal that all the land included therein is nonmineral. Again it is necessary to pass over the absurdity of a presumption which must run exactly contrary to the express exception that appears on the face of the patent, and which must also be sustained, if at all, in the face of facts of which this court has judicial knowledge, viz, that the report of the Commissioner of the General Land Office in 1868 (hereinafter quoted), approved by the Secretary of the Interior, conclusively shows that no final determination was made, but that the Land Department relied on the exception in the patent to fulfill the will of Congress.

Our contention here is that no such presumption can arise from the patent nor from the issuance thereof unless at least—

> (*a*) The patent affirmatively recites that the mineral character of the land was investigated and determined; or
>
> (*b*) The patent is shown to have been issued under a statute which conclusively required that such an examination and determination should be made before the patent could properly issue.

This matter of *res adjudicata* was carefully considered by this court in *Barden* v. *Northern Pacific Railroad Co., supra*. It there held, in relation to the Northern Pacific grant, that it was within the power of the Land Department to make a complete examination and determination as to the character of the lands, and that a patent, *reciting the character of the lands, that they were nonmineral*, would operate by way of an estoppel by judgment against the Government.

> Patents issued after an examination and determination of the fact by the government whether portions of the land embraced in such grants did or did not contain other minerals have been held as conclusive in subsequent controversies, and of this we shall speak more fully hereafter, but grants in aid of railroads (and we speak of no other grants) before such determination and issue of a patent have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case (p. 318).

> The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued, defining the character of the land granted, and showing that it is nonmineral, it will not comply with the act of Congress (p. 330).
>
> The government can not be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein (p. 331).

These statements in the *Barden case* are no more than application of the fundamental rules relating to estoppels by judgment. In fact the decisions of the Land Department are judgments of a special tribunal. Matters properly before the department and actually decided are *res adjudicata*, but other matters are open to determination at any time.

> The estoppel of a judgment does not extend to matter not expressly adjudicated, which can only be inferred by argument or construction from the judgment, except where they are necessary and inevitable inferences, in the sense that the judgment could not have been rendered as it was without deciding such points. 23 Cyc. 1297.

Citing *Hopkins* v. *Lee*, 6 Wheat. 109, at 114.

A judgment is conclusive on another suit only when it is shown either upon the face of the record or by extrinsic evidence that the precise question was raised in the former action.

> According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.
>
> *Russell* v. *Place*, 94 U. S., 606, 610.

The *Barden case* concedes (unnecessarily for the purpose of the decision) that the Land Department has power under the Northern Pacific grant to determine conclusively the character of land within the grant. If it were necessary for the purposes of this case, it might be questioned whether, under the Southern Pacific grant and the special exclusion clause of the joint resolution of 1870, the Land Office had any right or power to issue a patent without expressly excepting and reserving mineral lands. Not only does nothing appear in the act of 1866 to necessitate such decision, but, further, the joint resolution demands, instead of a judgment, a reservation in the patent itself. But whether or not the power existed, it is sufficiently obvious from the face of the patent that there is no recital that the lands are nonmineral, and it is also clear, not that an adjudication was made, but that no determination was even attempted.

This claim of estoppel by this patent is nurtured by a misapplication of the opinions in *Deffeback* v. *Hawke*, 115 U. S., 392; *Davis's Admr.* v. *Weibbold*, 139 U. S., 507, and *Shaw* v. *Kellogg*, 170 U. S., 312, backed by the discredited doctrine in the case of *Cowell* v. *Lammers*, 21 Fed., 200. The first two of these cases are carefully distinguished from a railroad grant case in *Barden* v. *Northern Pacific Railroad*, *supra*, by Justice Field, who delivered the opinion in each. The distinction is that, in preemption, town site, or homestead cases, the Land Department is authorized to grant lands upon a determination, and only upon a determination, of certain prerequisite facts—among which is the fact that the land is not chiefly variable for mineral. In these cases, therefore (preemption, homestead, and town site), it may well be said that titles to lands not known to be mineral at the time of patent are granted by the patent, because they are not excluded, but by inference are included, in the acts of Congress authorizing the grants. This is clearly pointed out in the Barden case. And it should further be noted that in railroad grants title passes by the *statute*, and not by the patent, whereas the opposite is true in town site, preemption, and homestead cases. Yet unless it can be said that the patent can operate to pass reserved mineral lands to a railroad upon some other theory than that of *res adjudicata* (and it has not been so contended), no title to the land here involved passed to the Southern Pacific Railroad either by grant or by patent.

Shaw v. *Kellogg* is in exact accord with the theory of estoppel here advanced. In that case the surveyor general of New Mexico, whose duty it was, determined that certain lands were nonmineral in character. The surveyor general approved the survey unconditionally, but placed (under instructions from the General Land Office) a reservation of mineral lands upon his certificate of approval of the plat. Time after time the Land Office ruled that the action taken was a finality; that the surveyor general had decided the lands to be nonmineral. It refused to issue a patent at the request of the grantee. The court held that there had been a final determination by the properly authorized officer (the surveyor general) that the land was nonmineral, and that, after such final determination, an exception on the plat was ineffective to offset the effect of the judgment. One has only to read the statement of the case and the opinion to note the constant reiteration of this fundamental feature—without which the decision could not have been rendered—that there had been an actual and final determination that the land was nonmineral, and that the Land Department so regarded it.

Shaw v. *Kellogg* has many points which shows its entire inapplicability as authority in the present case. In the first place, the grant was of a body of land, "not mineral," to be selected as a whole, by the grantee, and to be approved by the surveyor general as being properly selected. There was no

reservation of mineral lands in the tract to be selected, and nowhere did the grant make any such reservation, nor authorize the Land Department to do so. No right of lieu selection was given, for the obvious reason that the tract granted must, by the terms of the grant, be nonmineral. The tract was selected as required, and was approved as the statute directed. No reservation was attached to the certificate of approval, although the General Land Office attempted, through the surveyor general, to insert a reservation of mineral lands, which was not included in the terms of the grant, on the plat. The grantee was powerless to compel the Land Office to issue a patent and the Land Office repeatedly stated that the surveyor general had made a final adjudication that the lands were nonmineral, and were therefore removed from its power and segregated from the public domain.

In this it must be noticed that as the grant made no reservation of mineral lands, an attempt by the Land Department to reserve them was not fulfilling any intent of Congress; that final judgment had been rendered by the surveyor general, and that his judgment was subsequently many times accepted by the Land Department; that the patentees made bona fide effort to remedy any unauthorized reservation in their title, but were powerless to compel any further adjudication or patent by mandamus or otherwise; and that if the reservation by the Land Department, which had been subsequently so many

times repudiated by it, were valid, it would, by its failure to decide, effectively have thwarted the will of Congress, since the three-year period, within which the grantees were empowered to select, had expired.

Furthermore, in *Shaw* v. *Kellogg*, the discovery of mineral was made long after the approval of the selection, whereas in the present case the land was of known mineral character at the time of the patent, and presumably would have been discovered so to be had the Land Office made any examination of the ground, instead of relying on the exception in the patent.

Certainly there is nothing in the cases cited by the railroad which encourages any contention that a patent can operate as a judgment upon any matter which was not necessarily adjudicated, and does not appear from the face of the patent to have been adjudicated.

THIRD QUESTION.

Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

1. The reservation in the patent purports to fulfill the will of Congress by refusing to pass title to lands which Congress, in the grant and in the joint resolution of 1870, directed to be reserved. It therefore does not come under that class of cases in which the Land Department has attempted to enlarge or restrict the grant made by Congress, and thus substitute its will for the will of Congress.

That such reservation was consistent with the right and duty of the Land Department is certainly the law at the present time. Upon this point the *Barden case* suggests (p. 331):

> The government can not be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein.

The placer-mining law affords an analogy. It provides in effect that if the applicant for patent fails to include an application for all known lodes within the boundaries of the mining claim he shall be deemed to have waived all claim to such known lodes. This court has held that the legal effect of this provision is to create an exception of lodes known to exist at the time when the application to patent the placer claim is made. The Interior Department, in administering this law, adopted the practice of phrasing the patent in general terms calculated to exclude from its operation all such known lodes.

In *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687, 697, this court, with reference to such an exception, observed:

> It is said that this part of the patent is void because there was no law which authorized its insertion, and because it is in conflict with the

> rights of the claimant of a placer mine under the acts of Congress.
>
> Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute.

In the case of *Noyes* v. *Mantle*, 127 U. S., 348, involving the same statute, the court said (p. 354):

> A copy of the patent is not in the record, so we can not speak positively as to its contents, but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute.

The placer patent, even with the exception, has the effect of conveying *prima facie* title to all of the land within the boundaries of the placer claim. (*Iron and Silver Mining Co.* v. *Mike and Star Co.*, 143 U. S., 397, 401.) This necessarily means an obstacle in the way of the free exploration and location by the public of the known lodes. To avoid it, why might not the Interior Department undertake, in the placer proceedings, to inquire concerning known lodes and except specifically in the patent all those that were thus found to exist, inserting in the patent, as evidence that the inquiry and adjudication had been made, a recital or declaration appropriate to show that the remainder of the placer claim was free of such lodes? Is it not reasonable to say that the department has power to make such an inquiry and

finding—that is, to determine finally the character of the land—if it chooses to exercise the power under this statute? But instead of attempting to do so it has chosen the alternative of inserting a general exception, and this practice has been approved by the court. We submit that there is a very close analogy between this statute and the one involved in the present case.

The Supreme Court of California has uniformly held that exceptions of mineral lands inserted in railroad patents are valid.

> *McLaughlin* v. *Powell*, 50 Cal. 64; *Chicago Quartz Mining Co.* v. *Oliver*, 75 Cal. 194; *Carr* v. *Qingley*, 57 Cal. 394; *McLaughlin* v. *Heid*, 63 Cal. 208, 218; *Gale* v. *Best*, 78 Cal. 235, 240; *Van Ness* v. *Rooney*, 41 Cal. Dec. 695, 116 Pac. Rep. 392.

The latest case involving this question is *Eastern Oregon Land Company* v. *Willow River Land and Irrigation Company*, 187 Fed., 466. In this case Judge Bean expressed his conviction of the effectiveness of the exception of mineral lands in the patent. This view was combated upon appeal by Judge Ross, upon the same grounds as in the *Roberts case* (the companion case to the present case). Judge Gilbert, who had heard the appeal of the present case, concurred in the views expressed by Judge Bean, and Judge Morrow expressed no opinion upon this point.

Section 4 of the act of July 27, 1866, authorized the Secretary of the Interior to issue patents which

confirmed the title created by the grant. When the Secretary of the Interior issued a patent containing the exception imposed by the granting act, did not the patent *confirm* the title, and was it not, therefore, authorized by the granting act?

It must be conceded that if the patent issued by the Secretary of the Interior constitutes a fulfillment of the contractual obligations of the United States under the act of July 27, 1866, the patent was authorized by Congress. Suppose that the act had contained no provision for the issuance of patents; and that after the grant had vested in the railroad company Congress had passed a law authorizing the Interior Department to issue patents to the railroad company and had directed that the patents should include an exception of mineral lands. Would it be contended that the patents did not constitute a full discharge of the Nation's obligation? Or suppose that the subsequent act had simply directed the Interior Department to issue patents confirming the title created by the original granting act. Would not patents containing the exception of mineral lands found in the granting act have been authorized? Does it matter that the authority of the Interior Department was expressed in the original granting act itself? No one can deny that the patent issued in this case did *confirm* to the railroad company the title created by Congress. Did Congress intend that the patent should do more?

Counsel for the railroad company will probably cite upon this question *Cowell* v. *Lammers*, 21 Fed.

200, and *Francouer* v. *Newhouse*, 40 Fed. 618. These decisions can not be accepted as authority. Judge Sawyer, who wrote the opinions in both cases, based his decisions upon the theory that the exception of mineral lands included only lands known to be mineral at the time of the enactment of the grant. This theory was subsequently repudiated by this court in *Barden* v. *Northern Pacific*.

In 1868 the President communicated to Congress the report of the Secretary of the Interior for that year, in which was included a report to the latter official by the Commissioner of the General Land Office, from which we extract the following:

> MINERAL AND AGRICULTURAL LANDS—RAILROAD SELECTIONS.
>
> In every case reported from the district land officers of selections made under the acts of 1862 and 1864, for the Pacific railroad, the agent of the company in the first instance is required to state in his affidavit that the selections are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant. Upon the filing of lists with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned, and in other respects. They subsequently undergo scrutiny in this office, are tested by our plats, and by all the data on our files, sufficient time elapsing after the selections are made for the presentation of any objections to the department before final

action is taken; and to more effectually guard the matter, there is inserted in *all* patents issued to said railroad company a clause to the following effect: "Yet excluding and excepting from the transfer by these presents *all mineral lands*, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, 'not extending to coal and iron land.'" A decision is said to have been made by the Supreme Court of California, which, it is claimed, decides that an occupant of a mining claim having no title from the United States has no such standing in court as enables him to enforce the exception as to mineral lands, in patents issued to railroad companies, and may, therefore, be lawfully ejected from lands included within the general description of the tracts patented to such companies, notwithstanding the particular tract may be mineral in character, and fall within the exception. Not having seen that decision, we are ignorant as to the exact character of the ruling, but it is not understood how a person in the occupancy of mineral lands under the local customs and rules of miners, protected by the license granted in the first section of the act of July 26, 1866, could be ejected by a railroad company having no title to the land at all. The Government license, it is reasonable to suppose, would constitute a sufficient defence against any one not able to show a better title. The grantee of such license is no trespasser upon the public lands, and although the license is revocable by the United States, it can not be considered

as revoked by a patent to a railroad company when such instrument expressly excepts and excludes from the grant all interdicted mineral land. Claimants authorized to apply for and to obtain patents under the mining act have an efficient remedy in its provisions, and by taking the proper steps may obtain patents for their claims, even should they happen to be embraced within tracts patented to railroad companies, as the exceptions in such patents enable the United States to segregate the mineral lands included by distinct and separate conveyance to mining claimants. Placers more valuable for mining than for agriculture can not be entered as preemption or homestead lands, nor can they be selected by railroad companies. There may be difficulties, and sometimes even hardships, connected with the system of filing affidavits to prove the mineral character of lands claimed by a railroad company, or an agricultural settler, and taking witnesses before the local land officers; but these are, in a great measure, inseparable from the subject matter; preemptors and homestead settlers have the same difficulties to contend with, more onerous in the new States and Territories than in the older States, from the sparseness of the population not justifying additional land offices. It has been suggested to this office that the Government should appoint a commission to segregate the mineral from the residue of the public lands; but let any one consider the vast amount of money expended by practical miners in excavations to test the value of mines, subse-

quently abandoned as worthless, and some idea may be formed of the time and expense such an undertaking would require, and how little confidence it would be likely to inspire. When a miner has taken possession of mineral lands under the license of the Government, and has developed their character for mining purposes, it would seem that the task of protecting his rights could not be more onerous than that which every settler is liable to encounter in defending himself against adverse claimants. The regulation of filing affidavits is simply a means of ascertaining the class to which a particular tract of land may belong, and although it may not be the best that could be devised, it is the only practical mode that has suggested itself to meet the difficulty of disposing of different classes of land mingled together in such a way as to render it frequently impossible to tell, without great labor and expense, whether a particular subdivision belongs to one or the other class.

Executive Document No. 1, H. R., 40th Cong., 3d session, p. 152 et seq.

June 28, 1870, Congress, with the above report before it, and in order to confirm its grant to the Southern Pacific Railroad, the validity of which was in some doubt, owing to the route chosen by the company, passed the following joint resolution:

Upon the report of the Commissioners that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said

> company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

The language of this resolution indicates an intention on the part of Congress that the issuance of patents should not be delayed until the lands could be examined for indications of minerals, but that patents should be issued as rapidly as the railroad was constructed, the intention being that the lands earned by the construction of one section of the railroad should be available for the purpose of raising funds for the construction of the succeeding sections of the railroad. The resolution provided in express terms that these patents should cover all of the lands coterminous with the constructed sections of the railroad, and in effect provided that the patents should "save and reserve" the lands excepted by the provisions of section 3 of the original granting act, which included the exception of mineral lands. In this connection it should be borne in mind that from 1862 to 1871 Congress granted more than 125,000,000 acres of land in aid of the construction of railroads. These grants provided for the issuance of patents as rapidly as the railroads were constructed in sections of 20 or 25 miles. By the terms of these grants the railroads were required to be completed within ten

years from the dates of the grants. All of these grants (with a few exceptions) were of lands situated in regions known to contain rich deposits of minerals. It was a physical impossibility for the Interior Department to make an examination and adjudication as to the mineral or nonmineral character of 125,000,000 acres of land without giving to the business a vast deal of time. There was therefore a logical reason why Congress should direct the issuance of patents for all of the odd-numbered sections coterminous with the completed sections of the railroad, and at the same time direct that the patents should save and reserve the lands excepted by the terms of the granting act.

Despite statements of appellees to the contrary, the direction that the Secretary issue patents, "expressly saving and reserving the restrictions * * * provided for in the third section of said act" (among which was the mineral exception), was not debated in Congress, though a proposed amendment to it (which was in no way pertinent to the present discussion) received considerable attention. Not one word appears in the Congressional Globe which leads to the conclusion that the phrase does not modify the antecedent word "patents." This is the proper construction grammatically and logically, and, in view of the information then before Congress, the conclusion is irresistible that Congress was cognizant of, and approved, the action of the Land Department. Furthermore, the joint resolution is part of the grant, and a proper amendment to the grant, so that its terms

must be construed most strongly against the grantee. Certainly it can not be contended that Congress, with the report of 1868 before it, and knowing the reliance which the Land Office was placing upon the reservation of mineral lands in the patent, would have phrased the joint resolution as an apparent ratification of this practice unless it assented thereto.

Even if the phrase "expressly saving and reserving all * * * the conditions and restrictions provided for in the third section" can be twisted out of its ordinary grammatical and logical meaning, and merely expresses a determination that this may in some way be accomplished, nevertheless the Land Department adopted a method sufficient to accomplish this end, and, since Congress was aware of it, the method was certainly approved.

The Government claims that from the inception of railroad grants containing an exception of mineral lands, the Department of the Interior construed them as authorizing the issuance of patents, without an adjudication as to the character of the lands, but as authorizing in lieu thereof, a provision in the patents excepting mineral lands, and this construction was acted upon by the Interior Department for a period of nearly forty years, including the time of the issuance of the patent involved in the present case.

Railroad grants commenced with the Illinois Central grant of September 20, 1850, and ended with the Texas Pacific grant of March 3, 1871. Prior to the Pacific Railroads bill of July 1, 1862, all of the

railroad grants were situated in the Middle West, in nonmineral regions, and these early grants contained no exception of mineral lands. Commencing with the Pacific Railroads grant of July 1, 1862, all railroad grants (with a few exceptions) were situated in regions known to contain minerals, and all of these grants contained an exception of mineral lands in substantially the same terms as in the act of July 27, 1866. The administration of these railroad grants containing an exception of mineral lands did not become a practical question before the Interior Department until the year 1865, when the first application for patent was made by the Central Pacific Railroad Company under the act of July 1, 1862. In its litigation above referred to, the Government expects to show that when list No. 1 under the Central Pacific grant came before the General Land Office, the Commissioner of the General Land Office, Hon. J. M. Edmunds, prepared a form of certificate to be used as to lists and selections under railroad grants containing an exception of mineral lands; that this certificate in terms approved the list or selection, but contained the following proviso:

> Excluding, however, from the approval and from the transfer of the patent that may issue "all mineral lands," should any such be found in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron.

Also that the certificate was transmitted to the Secretary of the Interior, accompanied by a letter to

the effect that the certificate would be made the basis of the patent to be issued thereunder, and that, in the absence of contrary instructions, the form would be used in submitting like approvals thereafter; that the form was approved by the Secretary; and that later, during the year 1865, a form of patent was prepared, which contained an exception of mineral lands in substantially the language of the granting acts, and in the exact language of the certificate of the Commissioner of the General Land Office approving lists and selections for patent; that the form of patent thus prepared was submitted to and acquiesced in by the grantees under the grants theretofore made, and likewise became known to and was acquiesced in by the grantees under subsequent railroad grants, and continued in use from January 4, 1866 (the date of the first Central Pacific patent), until 1904.

This form of patent is given in full as the standard form used for the conveyance of railroad lands at page 288 of the official and authoritative compilation published in 1880 pursuant to direction of Congress, entitled "The Public Domain."

It is impossible to conceive that Congress has not been frequently advised of the practice of inserting an exception of mineral lands in railroad patents. In not one instance down to the present time has it ever disapproved of this practice. Not only did it acquiesce, but subsequently to the Commissioner's report for the year 1868 it enacted a number of grants containing an exception of mineral lands, with pro-

visions for the issuance of patents, in substantially the same language as the prior grants, including the act of July 27, 1866, without the slightest suggestion, by legislative enactment, committee report, or congressional debate that the construction placed upon these acts to the effect that the Interior Department was authorized to insert in the patents an exception of mineral lands, was disapproved. There is but one inference, and that is that the construction placed upon these acts by the Interior Department was in accord with the actual intent of Congress.

Attention is here called to the act of Congress approved February 26, 1895, 28 Stat. 683, which provided for the appointment of special commissioners to act under the jurisdiction of the Secretary of the Interior, with authority to conduct hearings and adjudicate what lands within the Northern Pacific grant in the States of Montana and Idaho were mineral in character. Congress would not have enacted this law had it understood that the Interior Department was already under a duty to inquire into and adjudicate the character of the lands claimed under this grant before issuing patents. Moreover, this act was passed shortly after the decision in the Barden case, which, as stated above, held that when there was no actual examination or adjudication as to the character of the lands, an exception of mineral lands should be inserted in the patents.

The railroad companies, including the Southern Pacific Railroad Company, have acquiesced in this

construction of the granting act by the Interior Department.

As heretofore stated, the form of the patent issued under these railroad grants was acquiesced in by the railroad companies. Patents in that form were issued uniformly from the beginning of the administration of these grants until the year 1904. The Government will show at the proper time that the railroad companies not only accepted these patents as a correct definition of the title, and caused them to be placed of record in the counties where the lands were situated, but that in making sales of these granted lands, the railroad companies, and particularly the Southern Pacific Railroad Company, recognized the validity of the exception in the patents by inserting in the deeds executed to the purchasers a similar exception of mineral lands in favor of the United States; that this practice was followed without deviation until the year 1904, and that thousands of these deeds, executed by the Southern Pacific Railroad Company, were recorded in the counties wherein the granted lands are situated.

It also expects to prove the following: That in 1886 the Commissioner of the General Land Office returned several lists of selections that had been filed by the Southern Pacific Railroad Company and required that they be supported by the affidavit of some person or persons having personal knowledge of the facts, proving the nonmineral character of

each forty-acre tract of land contained in such lists with the same degree of particularity and certainty as was required in the case of homestead entries. This was required so that the department could determine whether the lands were mineral. The Southern Pacific Railroad Company declined to comply with this requirement. Under instructions from the Commissioner of the General Land Office the lists and selections were disapproved by the local land officers. The Southern Pacific Railroad Company appealed from this decision, and the decision was sustained and the requirement insisted upon. The railroad company still declined to furnish the proof required. The issuance of patents was suspended from 1886 to 1891. Finally the Department of the Interior acquiesced in the position taken by the Southern Pacific Railroad Company, and the issuance of patents was resumed, without proof or adjudication as to the non-mineral character of the lands, and an exception of mineral lands was inserted in the patents and the patents were accepted. It was under these circumstances that the patent dated July 10, 1894, involved in the case at bar, was issued.

Even if it were to be conceded that the exception was not authorized by law, it could not be treated as void and nugatory without ignoring entirely the character and function of a patent as an instrument of conveyance. A patent, like a deed, can convey only that which it purports to convey; and it strikes us as almost absurd to argue that such an instrument will operate to pass the title to lands which, by its

own express terms, are excluded from the premises granted. The rule is well established and elementary that such an exception is part of the description, and the instrument containing it is not to be treated as conveying, or in any wise affecting, the land excepted. This is the view adopted by the Supreme Court of California in respect of railway patents like the one involved in the present case. (*McLaughlin* v. *Powell*, 50 Cal., 64; *Chicago Quartz Mining Co.* v. *Oliver*, 75 Cal., 194; *Van Ness* v. *Rooney*, 160 Cal., 131.)

See also *Leavenworth, &c., R. Co.* v. *United States*, 92 U. S., 746.

It matters not whether the patent be regarded in this instance as conveying the title, or as merely confirming the title already conveyed by the granting act. The principle is the same in either event: The *juristic operation* of the patent as a conveyance, whether original or confirmatory, is to be gathered from its terms, and not to be imported into it by a fiction which flatly contradicts its declarations.

One more suggestion before leaving this question. If the exception were "void" for all other purposes, it must, as a matter of common sense, be accepted as conclusive *evidence* that the question of mineral character was never passed upon by the department. If it was the duty of the department at all events to issue an absolute patent or none (which we deny), it was clearly the duty of the department to inquire very carefully into and determine the question of character before it proceeded further. The excep-

tion then would demonstrate that the patent was void, because issued in violation of legal duty—a conclusion which, in view of the lapse of time and the statute of limitations, would doubtless be welcomed by the railroad company.

The Government contends that the third question certified to this court should be answered in the negative.

FOURTH QUESTION.

If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

This question is closely related to the second question. The general doctrine that the issuance of a patent, based upon an entry under one of the general public land laws, raises a conclusive presumption of the existence of all of the facts necessary to authorize the issuance of the patent, is sometimes stated by the courts to the effect that the issuance of the patent constitutes a conclusive adjudication, sometimes that it constitutes a conclusive official declaration, and in some instances the courts have stated that it constitutes both a conclusive adjudication and a conclusive official declaration. Apparently this fourth question was certified to the court because of this condition of the authorities.

It is submitted that if the second question be answered in the negative, and it be held that the patent does not have the effect of a conclusive adjudication, for the same reasons it must be held that it does not have the effect of a conclusive declaration on behalf of the United States. In fact, the reasons would be more controlling as to the fourth question than as to the second. A judgment or adjudication necessarily operates by way of estoppel, while a declaration operates as an estoppel only when the other elements of estoppel are present. There is nothing in the record, or in the facts certified to this court, which establishes an estoppel against the United States unless it be upon the theory of *res adjudicata*, which is covered by the second question.

The patent contains no express declaration as to the character of the lands described therein. It can be treated as a declaration that the lands are nonmineral only by implication, at the most. And even if so considered, it would not be conclusive, for the reason that the facts certified to this court do not create an estoppel. It follows that even if an implication of a declaration that the lands are nonmineral could be indulged, this implication would not be conclusive, but would be rebuttable, and the Government asserts that when the entire record relating to the issuance of the patent is before the court, it will appear beyond doubt that the patent does not constitute a declaration on the part of the United States as to the character of the land. On the con-

trary, the proceedings show that the United States, speaking through its officers, expressly declined to make any such declaration.

It is submitted that under no theory can the issuance of the patent be treated as any declaration on the part of the United States as to the character of the lands, much less a conclusive declaration, and therefore the fourth question certified to this court should be answered in the negative.

FIFTH QUESTION.

Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral lands from the railroad grants?

The terms of the act of July 27, 1866, the rulings of the Interior Department, the decisions of this court, and the general legislation of Congress upon the subject leave no doubt that this question should be answered in the affirmative.

1. The excepting clause of the act of July 27, 1866, provides that "all mineral lands" are excepted. Congress then provided "that the word 'mineral' when it occurs in this act shall not be held to include iron and coal." Under familiar rules of statutory construction, it is not within the province of the court to say that Congress meant "coal, iron, and petroleum." The meaning of Congress is unequivocally expressed, and there is no ground for statutory construction. Congress having specified

the minerals which should not be included within the term "mineral" as used in the act, the court has no authority to extend the list.

2. The rulings of the Land Department have been almost uniformly to the effect that petroleum is a mineral within the meaning of all public-land laws. An apparent diversity of opinion arose because of the decision of Secretary Smith, rendered on August 27, 1896, and reported in 23 L. D. 222. In that decision it was held that although petroleum is a mineral, nevertheless petroleum-bearing lands did not come within the purview of the mineral-land laws of the United States or within the exception of mineral lands contained in the Southern Pacific grant of March 3, 1871. But this decision was reviewed by Acting Secretary Ryan on November 6, 1897, reported in 25 L. D. 351. The decision upon the rehearing was written, or at least supervised and approved, by Justice Van Devanter, then Assistant Attorney General for the Interior Department. The former decision of Secretary Smith was reversed, and, after an exhaustive discussion of the subject, it was held that petroleum-bearing lands come within the exception of mineral lands contained in the Southern Pacific grant of March 3, 1871, and the exception of mineral lands in that grant is identical with the exception in the grant of July 27, 1866, involved in the case at bar.

In *Gird et al.* v. *California Oil Company*, decided February 26, 1894, by Judge Ross, acting for the

United States Circuit Court for the Southern District of California, 60 Fed. 531, it was held that petroleum-bearing lands are mineral lands, and as such are excepted from railroad grants and can be acquired only under the mining laws relating to placer claims. This was one of the authorities relied upon in support of the decision of Acting Secretary Ryan above cited.

In *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 534, this court approved this ruling of Acting Secretary Ryan. The ruling is not cited specifically, but it is apparent from the opinion of this court that it was considered and approved.

3. Beginning with 1873, it was held by successive Secretaries of the Interior that petroleum bearing lands come within the purview of the mineral land laws enacted by the act of May 10, 1872, and subsequent mineral land laws. Shortly after the decision of Secretary Smith was rendered on August 27, 1896, the subject was considered by Congress, and resulted in the passage of the act of February 11, 1897, 29 Stat. 526, which provided that petroleum bearing lands should be subject to location and entry as mineral lands under the placer mining laws. The reports of the committees and debates of Congress relating to this act show that the act was not intended to establish any new law upon the subject, but to restore and approve the former practice of the Interior Department in treating petroleum bearing lands as mineral lands, and also to disapprove the decision of Secretary Smith. See the decision of

Acting Secretary Ryan above referred to, wherein, after reviewing the history of this enactment, it is said (p. 356):

> This legislative action, so promptly taken after the departure from the earlier rulings and the long-established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling.

4. The decision of this court in *Northern Pacific Railway* v. *Soderberg, supra*, held that mineral exceptions in railroad grants shall be strictly enforced, and in that case the court held that building stone was mineral within the meaning of the exception of mineral lands contained in the Northern Pacific grant. The court defined the general scope of this exception of mineral lands as follows:

> We are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture (p. 536).

Petroleum clearly comes within this general definition, and at page 534 of the opinion the Court mentions petroleum as one of the minerals that come within this exception of mineral lands inserted in railroad grants.

5. There is no reason to believe that Congress did not intend to include petroleum in the exception of mineral lands. But if there should be any doubt upon the question, that doubt should be resolved in favor of the public. The doctrine that public grants shall be strictly construed, in favor of the public and against the grantee, is applicable in determining what minerals come within the exception of mineral lands inserted in railroad grants. This was expressly held in *Northern Pacific Railway* v. *Soderberg*, *supra* (p. 534), and in the prior decision in *Barden* v. *Northern Pacific*, *supra* (p. 325).

6. The decisions of the State courts, and particularly the courts of Pennsylvania, which may be cited by counsel for the railroad company upon this question, can not be accepted as authority. In the first place there is a diversity of opinion which can not be reconciled. In the second place these decisions concede that petroleum is a mineral, and the most that any of them holds is that, under certain contracts between private contracting parties, petroleum was not within the contemplation of the parties. These decisions throw no light upon the intent of an exception of mineral lands inserted in a railroad grant. This view of the State authorities was expressed in the decision of Acting Secretary Ryan, *supra*.

SIXTH QUESTION.

Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as so alleged in the bill?

This question relates essentially to the rights of the appellants, and not to any right of the United States.

It can not be contended, however, that an attempt to enforce an exception of mineral lands, which appears both in the grant and in the patent, is an attack upon the patent. It is an effort to uphold the patent in its terms. The question as framed gives the impression that an effort is here being made to regain something which has been taken from the Governmend by fraud or error, whereas the effort is merely to retain and enjoy that which has never passed from the Government either by grant or by patent.

SEVENTH QUESTION.

If the mineral-exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

The acceptance of the patent in its present form was the voluntary act of the grantee. The record shows that the grantee agreed to take it and be bound by it. (R., 2.) In this there was not only a mutual interpretation of the original grant, and an agreement between the parties that the exception should be effective, but there was also such conduct as must clearly estop the grantee to question the exception, now that the time within which the patent may be corrected has presumably gone by. At the proper time the Government will endeavor to show that for forty years it has issued its patents without examination of the land, relying on the exception and that for the same length of time the company has accepted the patents without protest, and the Government has been lulled into security by the apparent acquiescence of the company. It has been made apparent that from the very start the Land Department was issuing these patents in the belief

that the Government was adequately protected by the exception, and that it was thereby enabled quickly to issue patents which otherwise would be interminably delayed. It is now too late for the grantee to proclaim its intention to contest the validity of the exception and thus to acquire a vast area of rich lands to which it has color of claim only through the medium of its silence and acquiescence in the exception in the patent. To permit it to do so would be to uphold it in the perpetration of a gross fraud upon the United States. This court has suggested that such course could not be effectively pursued by a grantee. This is to be noticed in the quotation heretofore made from *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687,697.

> "Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause," etc.

It is very apparent that the decision in the much cited case of *Shaw* v. *Kellogg* largely hinged upon the *bona fide* but unsuccessful efforts which the grantees in that case made to have their grant confirmed by the issuance of a patent of such nature as to settle the mineral or nonmineral character of the grant.

It is submitted that the railroad is not in a proper position to urge the supposed mistake of the Land Department to its own advantage, and to the detriment of the United States.

CONCLUSION.

In conclusion, we can not express the situation more forcibly than in the words of the closing paragraphs of *Barden* v. *Northern Pacific* (p. 331):

> An affirmance of the judgment in this case would enlarge the grant of the government against its oft-repeated exception of mineral lands and give to the plaintiff the vast mineral wealth of the States through which the grant passes. * * * And, as counsel justly observes, the same rule would apply to all our transcontinental railroads and give to them nearly all our mineral lands, when Congress has time and again declared that they should have no mineral lands, and that no act of Congress should be construed to give them any; and that they "in all cases shall be and are reserved exclusively to the United States unless otherwise specially provided in the act or acts making the grant."

Respectfully submitted.

WM. MARSHALL BULLITT,
Solicitor General.

ERNEST KNAEBEL,
Assistant Attorney General

B. D. TOWNSEND,
Special Assistant to the Attorney General.

DECEMBER, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

EDMUND BURKE, APPELLANT,
v.
SOUTHERN PACIFIC RAILROAD COMPANY and Kern Trading & Oil Company. — No. 279.

J. I. LAMPRECHT AND F. M. AIKEN, Trustees, appellants,
v.
SOUTHERN PACIFIC RAILROAD COMPANY and Kern Trading & Oil Company. — No. 280.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE UNITED STATES.

Now comes the Solicitor General, and by leave of court respectfully represents:

This cause was heard during the October, 1912, term upon seven questions of law certified by the Circuit Court of Appeals for the Ninth Circuit.

17329—13——1

The fifth question is as follows:

> Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral lands from the railroad land grants?

In the oral argument and in the several briefs submitted to the court, including a brief filed by the United States, this question was treated as a question of law. Subsequently a supplemental memorandum was filed by the Southern Pacific Railroad Company and Kern Trading & Oil Company relating solely to the fifth question and containing an appendix, prepared by one E. T. Dumble, a geologist in the employ of the Southern Pacific Company, designed to establish the proposition that petroleum is not a mineral in the view of the scientist. This appendix dwells insistently upon the organic origin of petroleum and upon the organic processes of decomposition and putrefaction through the aid of micro-organisms to which the original vegetable or animal substances, of which petroleum may be said to be the ultimate (though not the immediate) derivative, have been subjected; and the entire trend of its argument, assisted by the manner in which it selects and concatenates definitions and excerpts from the writings of scientific authorities, is to make prominent the organic nature of the original substances and the organic character of the first processes of transformation, so as to induce in the reader's mind the idea that

the product itself must also be organic and consequently nonmineral.

Its author cites and discusses the opinions and writings of some scientists and a few selected definitions from well-known lexicographers. Among the scientists whose works are cited are David White and F. W. Clarke, Chief Geologist and Chief Chemist, respectively, of the United States Geological Survey.

In his conclusion he says:

> The United States Geological Survey apparently treats petroleum as a mineral in their annual publication, Mineral Resources of the United States, but against this we have the statements of the members of the survey that it is an organic substance, and therefore can not be a mineral. (Appendix, p. xxvii.)

The purpose of this is apparent. Beginning with the year 1884 the United States Geological Survey has issued an annual publication concerning the mineral resources of the United States. In each issue of that publication petroleum has been uniformly included as one of the important mineral products of the United States. To meet this, the author of the appendix attempts to show that the two members of the Geological Survey, above referred to, have, in scientific writings, expressed the opinion that petroleum "is an organic substance, and therefore can not be a mineral."

At page 23 of the supplemental memorandum counsel for respondents invite the attention of the court to the pendency in the Federal courts of California of suits between the Government and the Southern Pacific Railroad Company involving the question whether petroleum is a mineral within the meaning of the exception of mineral lands inserted in the Southern Pacific Railroad grant, and state that testimony "is now taken, or is about to be taken, by the lower court upon this question."

In one of the suits thus referred to by counsel for respondents, testimony was taken by the Government at Washington, D. C., during the month of September, 1913. Among the witnesses who testified were a number of the members of the Geological Survey, including the Messrs. White and Clarke above mentioned. During the examination of Mr. White, on September 18, 1913, his attention was directed to this appendix, signed by E. T. Dumble, and particularly to certain passages on pages xvi and xvii purporting to be consecutive matter quoted from a scientific paper contributed by the witness to the June-July, 1908, number of Economic Geology, entitled "Some Problems in the Formation of Coal."

Mr. White testified that the matter so quoted was made up of selected paragraphs taken wholly from the first part of his discussion of the subject, some of which had been abridged in matters of substance, while others were transposed out of order in such wise as to pervert the meaning originally intended;

that an understanding of his entire paper would necessarily contract the proposition contended for by the quoter; and that even the matter quoted, if left unabridged and reproduced in natural order, would serve to destroy the contention that petroleum as obtained from the earth is an organic substance, but would establish that it is an inorganic substance derived by the action of inorganic processes on organic matter. Subsequent investigation of the matter quoted from Mr. F. W. Clarke disclosed similar liberties taken with the text of Mr. Clarke's "Data of Geochemistry" (Bulletin 491, United States Geological Survey).

Unmarked omissions and unindicated transpositions constitute the errors in quoting from these two authorities. Mr. White's paper, when carefully studied, indicates the essentially inorganic nature of both coal and oil and shows that geodynamic earth processes have played a necessary part in their formation. With regard to Dr. Clarke's paper, the conditions are similar. It certainly is not the fact, as implied by Mr. Dumble, that these papers either state or infer that petroleum is an organic substance and therefore can not be a mineral, nor does Mr. Dumble anywhere quote from any other paper by a member of the Geological Survey which so states or infers.

The White paper occupies pages 292 to 318 of the June–July number of "Economic Geology." It relates to coal primarily, but incidentally and inferentially to oil. The discussion of coal forma-

tion, and incidentally and inferentially of oil formation, recognizes two stages in the transformation from the organic to the inorganic; first a stage during which accumulations of organic débris are acted on and altered by organic processes—namely, by decomposition and putrefaction due to microorganisms—and second, a stage involving further and fundamental alterations through the agency of forces wholly inorganic, operating in the bowels of the earth, the cooperating forces of chemical affinity, heat, pressure, etc.

At page 311 of his paper, in closing the discussion of the first or organic stage, Mr. White says:

> In the preceding pages attention has been confined mainly to the initial stage of coalification, *i. e.*, the decomposition of the organic matter through the agency of microorganisms, among which the anaerobic bacteria are primarily indispensable. This process, which is essentially *biochemical* (organic), probably leads no further than the formation of peats, humus, recent sapropelic deposits, humic concentrates, etc. It remains to consider the second, or dynamochemical (inorganic) stage of coalification—the transformation, as the direct or indirect result of dynamic influences, of the coalifying material into lignite "bituminous" (humic) coals, anthracite, etc.
>
> NOTE.—The words "organic" and "inorganic" inclosed in parentheses in this quotation are inserted by the writer of this memorandum.

Reading this quotation and the matter following on pages 312 to 318 in connection with the paper as a whole, it seems entirely manifest that in the author's opinion the bitumens, including both coal and petroleum, regardless of the character of the matter from which they are originally derived, are in the end the products of inorganic geochemical and geophysical forces. Quotations, therefore, which fail to direct the attention to the final or *inorganic* stage of the process, but which are confined solely to the author's discussion of the initial or *organic* stage, are signally misleading. The entire matter quoted in the Dumble appendix is from the discussion of the first stage found in the pages preceding page 311 of the original paper, and no part of it is taken from any portion of the discussion of the second stage.

The first three paragraphs on page xvi of the appendix are found on pages 304 and 305 of the original, while the succeeding paragraphs are taken from the pages preceding, *i. e.*, from pages 297, 298, and 299, respectively, of the original, the true meaning of which is by no means elucidated by the process of inversion, which is nowhere indicated in the copy. The borrower of these quotations also passed over a significant paragraph almost immediately preceding the one he first selected, viz (p. 303):

> The ordinary process of coalification of an accumulation of organic débris embraces two stages of prime importance: (*a*) The

putrefaction stage which is, at least dominantly, biochemical; and (*b*) the alteration or metamorphic stage, which is dynamo chemical, being induced and regulated, in the main, by geodynamic influences. The latter embraces phenomena ranging from pressure-dehydration and lithification, to graphitization.

Thus, even in his discussion of the initial or *organic* state of the process, Mr. White outlines clearly the second or *inorganic* stage of dynamo-chemical alteration.

Again, the appendix vouchsafes no indication of a certain important omission of substance occurring after the fifth quoted paragraph on page xvii, viz (from White, p. 298):

> The discovery of hydrocarbon-bearing strata composed largely of such organisms in rocks as old as the Ordovician strongly suggests an algal origin for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian.

Here Mr. White suggests the metamorphism induced by purely *inorganic* agencies, by which a substance of admittedly *organic* origin (algæ or seaweeds) has been transformed into a well-recognized mineral substance — indeed, a mineral species (graphite). The entire paragraph as it appears intact in the original here follows, the part omitted in the appendix being printed in italics:

> *The discovery of hydrocarbon-bearing strata composed largely of such organisms in*

rocks as old as the Ordovician strongly suggests an algal origin for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian. The question of the part played by algæ in the genesis of petroleums was meanwhile being considered independently by Potonie, whose conclusions, appearing almost simultaneously, are substantially the same. This able German paleobotanist, who now has devoted much research and discussion to the subject, applies the term " Sapropel " to the accumulating residuum of the gelatinous or fatty algæ mingled with more or less animal matter partially decomposed or putrefied in stagnant or quiet water.

It will be seen that the part of this paragraph excerpted by Mr. Dumble has to do with the original organic matter only, while the part left out reveals Mr. White's opinion that such matter, when acted on by earth forces, may be metamorphosed into the specific mineral, graphite. As the result of similar selections and omissions the tendency of the quotations in the appendix is to give the impression that White wrote only of the organic phases in the evolution of petroleum and to instill the belief that he regards petroleum as wholly organic both in origin and in mode of derivation. This is wholly fallacious.

On pages xviii, xix, and xx the appendix quotes liberally from Mr. Clarke's work on the " Data of Geochemistry," as a basis for claiming support from that work for the proposition that petroleum is an

organic substance and, therefore, a nonmineral substance. The first and second paragraphs on page xviii are but parts of a paragraph found at page 697 of the original. The paragraph as a whole is as follows:

> From data of this kind, and from the experiments cited in the preceding section of this chapter, it is evident that hydrocarbons analogous to natural gas, petroleum, and asphalt may be derived either from animal or vegetable matter, or from both. This, I think, admits of no dispute, but argument is possible relative to the genesis of the larger accumulations of mineral oil. (Engler's researches have led to a widespread belief in the animal origin of petroleum, although the details of the transformation process are very diversely interpreted. Engler himself ascribes the derivation of petroleum from animal remains to a putrefactive process, which removes the nitrogen compounds. *The fats remain, to be altered by heat and pressure into hydrocarbons, whose boiling points lie below 300; and these later undergo a partial autopolymerization into denser forms.* How far such a polymerization may be possible, if indeed it is possible at all, is a matter of uncertainty. C. F. Mabery holds that the changes are always in the opposite direction and that the more complex hydrocarbons are formed first, partially breaking down afterward into lower members of the series. J. Marcusson holds the same view. The putrefactive removal of the albuminoid

substances is also to be questioned, and it is certainly not universal.) The nitrogen bases of California petroleum furnish perhaps the strongest evidence that the proteids contribute their share to the make-up of petroleum, and show also these particular oils are of animal origin.

The matter above included within parentheses is omitted by the appendix. The rest is quoted in the appendix without employing any sign to indicate the omission. By this process of exclusion the parts that refer to the organic nature of the primary substances are brought forward, and those which relate to the inorganic processes of metamorphosis are suppressed. The result is to convey a false impression of Clarke's attitude toward the problem as a whole, and this is true in spite of the fact that the parts excluded consisted in the interpretation of the views of other scientists.

In the original, at page 700, Mr. Clarke says:

> Data of this class might be multiplied almost indefinitely. For instance, C. E. Bertrand and B. Renault have shown that Boghead mineral, torbanite, and kerosene shale, from which oils are distilled, are derived from gelatinous algae, whose remains are embedded in what was once a brown, humic jelly. *This observation may be correlated with the views advanced by J. S. Newberry and S. F. Peckham, who regard the liquid petroleums as natural distillates from carbonaceous deposits, which latter were laid down at depths below the horizons where the*

> *oil is now found. The heat generated during the metamorphism is supposed to be the dynamic agent in this process, although many productive regions show no evidence that any violent metamorphoses have ever occurred.*

The first two sentences are quoted in the appendix at pages xix and xx; the sentences which we have italicized are omitted.

It is true that the views of Newberry and Peckham are referred to in the appendix (xi–xiii) as also the views of Engler (ib., xv). The views of Clarke, however, are not fairly revealed by the peculiar eclectic method pursued by Mr. Dumble.

At page xxi of the appendix the author, in contending that petroleum is an organic substance, observes:

> This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality. (Clarke, p. 702.)

An examination of page 702 of Clarke's "Data of Geochemistry" fails utterly to support any such statement. Neither on that page nor elsewhere does Mr. Clarke use the expression "organic oils." The transposition of his reference to oil of "organic origin" into the expression "organic oils" is not justified at any point by Mr. Clarke nor by any authority mentioned in the appendix; neither does the most liberal construction of any authority cited in the appendix justify in the slightest degree the

further statement on page xxi that "even those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved, recognized the resultant as an organic substance."

It is not our object to reflect upon the author of the appendix, much less upon the distinguished and high-minded lawyer (now, unhappily, passed away), or his associate counsel, whose names are signed to the supplemental memorandum. We are told by present counsel for the Southern Pacific interests that the appendix was prepared by Mr. Dumble without knowledge that it was to be published or presented to this court, and that there was a misunderstanding in this regard upon the part of Mr. Evarts. This explanation we gladly accept. The facts remain, however, that the appendix has been printed and filed, and that it is misleading. It claims to reflect the views of experts in the Geological Survey, to the effect that petroleum "is an organic substance, and, therefore, can not be a mineral" (p. xxvii). We are satisfied that this is wholly incorrect, and that a careful study of the papers cited will establish the fallacy. There are few scientists who deny the organic *origin* of petroleum and none of repute who deny the organic *origin* of coal. It is therefore entirely beside the mark to quote, as the appendix does, copiously, from the White and Clarke papers to the effect that coal and oil are organic in origin. Both White and

Clarke admit this—in fact, are positive in their views as to all coal and most oil; but neither White nor Clarke, nor, we think, any other member of the Survey, believes that because these substances are derived from organic materials they are now organic substances and therefore not mineral substances. It should be noted that practically all the authors quoted by Mr. Dumble recognize the distillation or transformation (inorganic) process in converting the organic substance into petroleum. The geodynamic processes to which the original organic materials have been subjected have resulted in new products which are inorganic. Scientific experiments and common commercial practice have shown that it is impossible to subject animal, vegetable, or mineral oils to distillation without breaking down the oils into new and different compounds. There is no question that the petroleum obtained from the earth is a different chemical compound from the organic substance from which it originated. In fact the transformation is more complete in petroleum than in coal, for the latter may retain some of its original constituent compounds. We believe that these propositions rest upon a firm basis of scientific authority. The assumption that an inorganic process transforms an organic substance into another of organic nature seems not worthy of serious consideration. These inorganic processes are primarily heat and pressure, it is true, but they are natural processes carried on in the earth's crust beyond the control of

man and without his intervention. The fact that man can in a measure produce the same results does not affect the conclusion. Man by the application of heat and pressure can produce diamonds from organic materials. Yet no one because of that fact would contend that diamonds formed by heat and pressure in the earth's crust are not mineral.

In order to understand the question thoroughly it is necessary to recognize clearly the distinction between an organic substance and a substance of organic origin. The fact that a substance was originally organic does not mean that it is now an organic substance. Vegetable and animal tissues are organic substances. Substances which were once vegetable and animal tissues but have since been transformed into new chemical products by inorganic agencies are no longer organic substances, but have become inorganic substances of organic origin. Thus wood is an organic substance, while graphite, many if not most limestones, probably some diamonds, and others are inorganic substances of organic origin. No one would seriously contend that these latter are now organic substances or would deny their mineral character, yet they were originally vegetable or animal matter, or both.

A consultation of the originals, it is believed, will show that Mr. Dumble's method of dealing with some of the other authorities cited is similar to the method employed in the cases of Messrs. White and Clarke. We do not, however, feel at

liberty to do more in this regard than to make the suggestion to the court and to call attention particularly to one more illustration. In support of the proposition that petroleum is not mineral, the appendix gives certain definitions on pages xxiv and xxv, including definitions from the "System of Mineralogy," the standard treatise of E. S. Dana. Undoubtedly these quotations go to show that petroleum is not "a mineral" in the sense of being a definite mineral species. To constitute a mineral species there must be a definite chemical composition and a certain characteristic molecular structure revealed in peculiar crystallization and in other physical ways; but it does not, of course, follow that because a natural substance fails to meet these requirements it must necessarily be a nonmineral substance. The chemical and physical properties of petroleum are simply so indefinite or variable that they do not conform to the rigid requirements of the science of pure mineralogy, which will not admit into its categories as a mineral *species* a substance which, chemically and physically, is not definite and one and the same wherever occurring. It is significant, however, that the hydrocarbons petroleum, asphalt, and coal are classified and described in the appendix of Dana's "System," pages 1015 *et seq.* Of these substances Dana says (p. 1015):

> The substances included here are: 1, Petroleum, passing into the viscid bitumen, maltha or mineral tar; 2, the solid bitumen

asphaltum; 3, mineral coal. These are in general more complex substances than those included in the preceding pages and have still less claim to be regarded as definite mineral species (*though it may be a matter of convenience in many cases to have the different kinds provided with names*). *It is hence not unnatural to separate them from the somewhat more definite substances previously described in this chapter, although no line can be drawn between them, and the division must be made somewhat arbitrarily. In fact, it may be noted that even some of the substances ordinarily classed as coals, in behavior toward solvents and in composition, approach closely to hydrocarbons already mentioned.* (*cf. torbanite,* pp. 1009, 1022.)

The part of this paragraph which is italicized was omitted from the quotation given on page xxv of the Dumble appendix.

Dana evidently considered these substances as mineral, otherwise he would not have devoted to them some ten pages of his treatise on minerals (*loc. cit.*, pp. 1015–1024).

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~662~~. 279

EDMUND BURKE, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), AND THE KERN TRADING AND OIL COMPANY (A CORPORATION), APPELLEES.

No. ~~663~~. 280

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), THE KERN TRADING AND OIL COMPANY (A CORPORATION), AND T. S. MINOT, APPELLEES.

PETITION OF APPELLEES FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MAXWELL EVARTS,
Attorney for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), AND THE KERN TRADING AND OIL COMPANY (A CORPORATION), APPELLEES.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (A CORPORATION), THE KERN TRADING AND OIL COMPANY (A CORPORATION), AND T. S. MINOT, APPELLEES.

PETITION OF APPELLEES FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition of The Southern Pacific Railroad Company (a corporation), The Kern Trading and Oil Company (a corporation), and T. S. Minot, appellees, respectfully shows to this honorable court as follows:

1. Appellant Edmund Burke, on October 31, 1910, filed amended bill of complaint in the Circuit Court of the United States in and for the Southern District of California, Northern Division, against The Southern Pacific Railroad Company (a corporation), and The Kern Trading and Oil Company (a corporation), and others, wherein said complainant alleged, in substance, that he was the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of land listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all of said lands were covered by valid subsisting mining locations theretofore made by divers citizens of the United States, pursuant to the mining laws, and made after discovery of mineral in the respective claims; that on July 10, 1894, a patent, purporting to convey 3,200 acres of the lands granted to the Southern Pacific Railroad Company, including the certain lands aforesaid, under the granting act of Congress, of July 27, 1866 (*14 Stat., 292*), and joint resolution of Congress, of June 28, 1870 (*16 Stat., 382*), issued from the United States to said company and was accepted by it and recorded; that at the time thereof said lands were not public lands, but were segregated from the public domain, the beneficial title thereto being held by the mining locators, of which said railroad company had due notice; that said company caused its land agent to make a false and fraudulent affidavit and application for patent, wherein he deposed that said lands were vacant, unappropriated, and not interdicted or mineral lands; that no notice of said application was given to any of the owners of the mining locations then existing upon said land; no hearing was had concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; but said patent contained an exception and reservation in these words:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this

exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

The prayer of the bill was for an injunction, *pendente lite* and permanent, against defendants, and each of them, from claiming any right, title, interest, or estate in or to any of the lands mentioned, and for such other and further relief as may be just and equitable.

2. Demurrers to said amended complaint were filed by each of the appellees above named; the same came on for hearing before the court, were sustained, and said amended bill of complaint dismissed, by decree of said court duly entered on March 21, 1911; from which decree said Edmund Burke prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the same was allowed March 22, 1911.

3. Appellants J. I. Lamprecht and F. M. Aiken, trustees, who were made parties defendant to the complaint in the suit of Edmund Burke, *supra*, filed answer to that cause, substantially admitting the allegations of the complaint, and also alleged that said railroad company, with full knowledge, did, for itself, its successors and assigns forever, accept, assent, and submit to each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, and reservations contained in the certain act and joint resolution of Congress aforesaid, and so accepting, assenting, and submitting thereto, did receive and accept the certain patent aforesaid; wherefore, said railroad company, and all others claiming under it, are bound by the certain exceptions and reservations, etc., aforesaid, and are estopped to resist or deny the binding force and effect of the same. Said answer prayed affirmative relief, substantially as prayed in said amended complaint, to which was added a prayer that the court construe and interpret the mineral exclusion clause contained in the granting acts aforesaid, as

well the mineral exclusion clause contained in the certain patent aforesaid.

And said J. I. Lamprecht and F. M. Aiken, trustees, likewise filed their certain amended cross-bill in said case, the same being, *mutatis mutandis*, substantially in the same words and praying like affirmative relief as in the answer so filed by them, as aforesaid.

4. Demurrers to said cross-bill were filed by each of the appellees above named; the same came on for hearing, along with certain other demurrers to the amended bill of complaint aforesaid, whereupon said demurrers to said cross-complaint were likewise sustained and said cross-complaint dismissed by decree entered March 21, 1911; from which decree said J. I. Lamprecht and F. M. Aiken, trustees, prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and the same was allowed June 20, 1911.

5. Subsequently, on October 16, 1911, the aforesaid causes came on for hearing in regular order before the United States Circuit Court of Appeals for the Ninth Circuit, and were thereupon argued and heard together and submitted.

6. That on or about the 18th day of March, 1912, the said United States Circuit Court of Appeals for the Ninth Circuit certified to this honorable court certain questions or propositions concerning which the said Circuit Court of Appeals desired the instruction of this honorable court for its proper decision.

7. That among the questions so certified (seven in number) are the following:

> "Fifth. Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of Congress reserving mineral land from the railroad land grants?
>
> * * * * * * *

"Seventh. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

8. That the certain question *fifth* aforesaid, namely, whether petroleum or mineral oil is within the term "mineral" as it was used in said acts of Congress reserving mineral land from the railroad land grants, presents for the determination of this court a question of fact, and not a question or proposition of law; but in the absence of any evidence touching said question there is nothing upon which this court can properly determine such mere question of fact.

Furthermore, petitioners show that the record in said causes, if considered in connection with the question so certified, as below prayed, will disclose that there is nothing therein contained upon which said question of fact can be properly determined, the causes having been heard and decided upon complaint, cross-complaint, and demurrers to each. Said complaint and cross-complaint abound in allegation that the lands are valuable for mineral, using that term in the abstract, without specifying the particular kind or kinds of mineral supposed to be contained therein, except in one place in the charging part of the complaint (paragraph 21), wherein it is alleged that said lands, previous to March, 1909, were formally designated by the Department of the Interior, after complete and thorough geological examination, to be lands bearing petroleum in commercial quantities. Said question was not discussed in the briefs nor was it argued before said Circuit Court of Appeals.

9. That the certain question *seventh* aforesaid, namely, whether, in the event the mineral exception clause was inserted in the patent with the consent of said railroad company, and under an understanding and agreement between it and the officers of the Department of the Interior that said clause should be effective to keep title in the United States to such of the lands so patented as were, in fact, mineral, are the defendants now estopped to deny the validity of said clause?

No allegation is made or contained in either complaint or in either record that in any way justifies or warrants the submission of said question; it is entirely and absolutely outside of the record in each said case. It asks this court, upon an assumed (as well unwarranted and unfounded) premise of fact, to find a legal conclusion based thereon—a mere moot question, not supported by the record in either case and not accurate in point of fact.

10. Petitioners are advised that this court should not be asked to pass upon the question of fact embraced in said *fifth* question, *supra*, in the absence of any evidence touching the fact so inquired about, and, furthermore, they are advised that, under the act of Congress in such case made and provided, only questions or propositions of law are authorized to be certified to this court for its proper decision; and, as to the *seventh* question, *supra*, that this court should not be asked to pass upon the same, for the reason that the premise of fact assumed therein, upon which the question itself is based, is not based upon anything appearing in or justified by the record in either said case.

It is, however, obvious that if the certain questions aforesaid are not justified by the records, the only way to determine the causes is for this court to direct the whole records to be sent up to it.

Wherefore your petitioners respectfully pray that the writ of certiorari may issue, under the seal of this court,

directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing and requiring said court to certify and send up to this court for its consideration, on a date certain to be designated therein, the whole records and causes, and a full and complete transcript of all and every part of the record and proceedings of the said Circuit Court of Appeals in the said cases therein entitled Edmund. Burke, appellant, *versus* The Southern Pacific Railroad Company (a corporation), and The Kern Trading and Oil Company (a corporation), appellees, No. 1981, and J. I. Lamprecht and F. M. Aiken, trustees, appellants, *versus* The Southern Pacific Railroad Company (a corporation), The Kern Trading and Oil Company (a corporation), and T. S. Minot, appellees, No. 2028, remaining on file in the office of the clerk of the said court, and not embodied in the transcript already filed in this court as the record in the certain causes aforesaid; and that, thereupon, the certain transcript of the record in each said case sent up to this court along with the certain certificate hereinabove referred to, but which said transcripts of record are not in said certificate made to be a part thereof, may be taken and deemed to be the return by said Circuit Court of Appeals to said writ of certiorari; to the end that this court shall decide the whole matter in controversy in the same manner as if it had been brought here for review by appeal, as provided in section 239 of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (*36 Stats., pt. 1, p. 1087*), and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with the said act.

Your petitioners request that the certified copy of the entire records in each said case, so now on file in the clerk's office of this court, as hereinabove stated, may be taken as and deemed to be compliance by petitioners with the provisions and requirements of Rule 37, subparagraph 3, of the rules of this court.

And your petitioners will ever pray.

MAXWELL EVARTS,
Attorney for Petitioners.

NEW YORK CITY, N. Y., *July* 12, 1912.

To

EDMUND BURKE, Esq.,
Appellant, No. 682, (*in propria persona*),
616-617 *Central Building, Los Angeles, California.*

D. J. HINKLEY and E. J. BLANDIN,
Attorneys for Appellants, No. 683,
1008 *Wright & Callender Building,*
Los Angeles, California.

DEAR SIRS: You will each please take notice that, upon the coming in of the Supreme Court of the United States, at the beginning of its October Term, 1912, on Monday, October 14, 1912, or as soon thereafter as counsel can be heard, petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit, of which the above and foregoing is a true copy, will be presented to said Supreme Court of the United States for consideration and action.

Respectfully,

MAXWELL EVARTS,
Attorney for Petitioners.

Service of copy acknowledged this 17th day of July, 1912.

EDMUND BURKE,
Att'y in Pro. Per.
D. J. HINKLEY &
E. J. BLANDIN,
By D. J. HINKLEY.

Supreme Court, U. S.
FILED.
SEP 9 1912
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 279

Edmund Burke,

Appellant,

vs.

Southern Pacific Railroad Company, The Kern Trading and Oil Company,

Appellees.

Memorandum Opposing Application for Certiorari.

Edmund Burke, Attorney in Person.

Press of Stone Co., Law Printers, Los Angeles, Cal.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 682

Edmund Burke,
Appellant.

vs.

Southern Pacific Railroad Company, The Kern Trading and Oil Company,
Appellees.

Memorandum Opposing Certiorari.

Opposing the application for a writ of *certiorari* herein appellant contends;

I.

The petition should be denied by reason of the fact that the Circuit Court of Appeals for the Ninth Circuit being desirous of being informed concerning the law on a momentous issue saw fit to certify seven questions to this court for its de-

termination, as such determination will affect a vast acreage of claimed mineral lands and will enable the Circuit Court of Appeals to correctly apply the law relating to the validity of the insertion of the mineral exception in patents issued without an antecedent examination or determination for lands granted to railroads under the various land grant acts. It appears on the face of the certificate from the Circuit Court of Appeals, from the Ninth District, that the judges thereof are divided in opinion, that many cases await in that court the application of the law that will be laid down in this case by this court and it may properly be said in passing that a conclusive determination of such questions are of great importance to the United States whose department of justice is contending for a construction similar to that sought by the appellant. The certificate of the Circuit Court of Appeals is attached to this memorandum marked exhibit A and we submit no useful purpose will be served by sending up the record to this court—only the questions certified to this court should be passed on leaving the many other questions to the decision of the Circuit Court of Appeals.

II.

The petition of the appellees is based on their objection to the consideration by this court of the 5th and 7th questions contained in the certificate

which contains a most complete exegesis of the questions involved.

The certificate plainly shows that it was carefully considered and carefully drawn for the plain and apparent purpose of securing from this court a statement of the law so that it could be applied in the determination of the many cases pending and based on the identical questions that the appellees object to. If this case be decided on some side issue, on some tangent the purpose of the Circuit Court of Appeals will be defeated and land worth a *billion* dollars will be the subject of continuing litigation.

III.

The purpose of the questions will be seen by a glance at the certificate. The fifth question reads:

"Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants?"

Appellees contend that no such issue was presented to the Circuit Court of Appeals. The brief of counsel for the appellees in that court contained this statement (p. 21 of brief in Circuit Court of Appeals).

1.

"Petroleum or oil is not within the meaning of the term "mineral" as it was used in the acts of congress reserving mineral lands from railroad

land grants and oil bearing lands are not reserved from such grants.

The efforts of the complainant in this case to secure the title to the land described in the amended bill of complaint is prompted by the belief that such lands are valuable because of the petroleum or oil supposed to be contained therein. Whenever the question is presented in any case so that it may become material, we shall present to the court our views to support us in the contention that petroleum or oil is not a mineral within the meaning of the term, as it was used in the act of congress here in question. No valid reason can be suggested why, if congress intended the railroad company to have the benefit of any coal or iron lands within these limits of the grant, it should not also have the benefit of any oil or petroleum within such grant, as oil or petroleum is as essential to the business of a railroad company as coal or iron; and was not a "mineral" within the meaning of the term as it is used in the granting act.

This question, however, is not involved upon the record in the present case, because it does not appear from the amended bill of complaint as to what the character of the mineral was which it is claimed excepted the land from the grant to the railroad. All this is alleged is that prior to the issuance of the patent the lands were covered by "valid subsisting mining locations * * * after a

discovery of mineral on each of said mining claims" [Tr. p. 13, fol. 10] and that at the time of the "making of said grant and the issuance of said patent, prior thereto and ever since, said lands and sections and each legal subdivision thereof were mineral and not agricultural in their character." [Tr. p. 18, fol. 14.]

It is true that in paragraph 21 of the amended bill of complaint [Tr. p. 23, fol. 18] it is alleged that sections are mineral lands and have since July 28, 1866, been more valuable for mining than for agricultural purposes; and were, previous to March, 1909, formally designated by the Department of the Interior after complete and thorough geological examination to be lands bearing petroleum in commercial quantities, etc."

It will be seen that the railroad appellee raised the question of the mineral character of petroleum and the Circuit Court of Appeals well understanding the defenses the railroad company raised and intended to continue raising, certified the question to this court for determination as the suggested defense runs to the merits and is not a question of fact but a question of law as this court in Soderburg v. N. P. R. R. Co., 188 U. S. 526 has already, by implication at least, held that petroleum was a mineral and that petroleum bearing lands fell within the inhibition of the congressional railroad land grants which excluded mineral lands from passing to the railroad

grantees. We submit the action of the Circuit Court of Appeals should not be disturbed in such particular.

IV.

The 7th question certified to this court reads as follows:

"If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

The appellees contend that no allegation is contained in the record that in any way justifies the submission of such question.

The assertion of the appellees is very broad but, in fact, is unfounded.

The court will remember *that only a general demurrer* was interposed to the amended bill of complaint. *No question* as to the sufficiency of the pleading was raised by the appellees in the court below—

The bill (par. 16) alleged—

"16. Your orator further says and shows unto Your Honor that the defendant, the Southern

Pacific Railroad Company, did assent to all of the terms and conditions of said act of congress approved July 27, 1866, and the joint resolution of June 28, 1870, and they did wholly submit to and accept the terms and conditions of said acts and did agree that the Southern Pacific Railroad Company and its assigns and successors and all persons then or now in privity with it, should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation did not convey to said defendant, the Southern Pacific Railroad Company, the lands hereinbefore described or any part thereof, *and that said exception, exclusion and reservation was a term of description which was accepted by the said Southern Pacific Railroad Company at the time of the issuance of such patent.*" And in any event the question was fully presented by the allegation in the cross-bill in the suit concerning the same and the language of which is fully set out in the annexed certificate of the Circuit Court of Appeals.

The bill (paragraph 18) alleged—

"18. Further *reiterating* all the foregoing allegations, complainant alleges that said grant and patent did not convey said sections or any part thereof, and said patent to said Southern Pacific Railroad Company was issued by the United

States and accepted by the said Southern Pacific Railroad Company with said exception and reservation expressly excepting, precluding and excluding all mineral lands that might at any time be found therein and that the said Southern Pacific Railroad Company accepted the same with such exception and reservation. * * * "

Paragraph 19 of the bill alleges the acceptance and recordation of the reserved and excepted patent—

Up to the time of the application herein no objection was made to the sufficiency of the pleading and the matter constituting the 7th question *was fully argued, without objection, in the courts below.* We submit the application should be denied.

EDMUND BURKE,
Attorney in Pro. Per.

EXHIBIT A.

United States Circuit Court of Appeals for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees. No. 1981.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that

The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866, (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by

the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands," that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in

the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht, *et al.*, who were defendants to said bill, filed a cross-bill in said

cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complanants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and conscience estopped to resist or deny

the binding force and effect of same or any part thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted to this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and effect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court, on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions, the following questions are hereby certified to the Supreme Court of the United States for its decision.

First. Did the said grant to the Southern Pacific Railroad Company include mineral lands

which were known to be such at or prior to the date of the patent of July 10, 1894.

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the land office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral.

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect.

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attach a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuances of the patent have been complied with.

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants.

Sixth: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attaching the patent on the ground of fraud, error or irregular-

ity in the issuance thereof as so alleged in the bill.

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company, and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed.) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under section 134 of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912, F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

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JAN 3 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY,
Appellees.
No. 279

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY,
Appellees.
No. 280

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

MAXWELL EVARTS,
HENRY W. CLARK,
Of Counsel for Appellees.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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1. In the administration of the public land laws generally it has long been settled that the issue of a patent by the Department of the Interior, under an Act of Congress providing for the disposal and patenting of public lands, is an official determination and declaration by the Department that the land so patented is of the character subject to disposition under such Act and that all statutory requirements preliminary to its issue have been complied with; and that this determination is conclusive except in a direct proceeding for its annulment or limitation brought by the Government or its privies 16

2. The foregoing proposition as to the presumptions inherent in a patent, concerning the character of the land and other prerequisites of its issue, are fully applicable in the case of patents issued under the Southern Pacific Railroad grant, and parties not in privity with the Government are not entitled to attack such a patent upon allegations that there was no investigation or determination by the Department as to the character of the land or that the land was in fact mineral land 21

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Supreme Court of the United States,

OCTOBER TERM, 1912.

EDMUND BURKE, Appellant, vs. SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, Appellees.	No. 682.
J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants, vs. SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, Appellees.	No. 683.

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEES.

Statement.

This is a suit in equity instituted by Burke, the appellant in No. 682, in the United States

Circuit Court for the Southern District of California, Southern Division, against the appellees Southern Pacific Railroad Company (hereinafter called the Railroad Company) and Kern Trading and Oil Company and various other defendants, including Lamprecht and Aiken, appellants in No. 683, who filed a cross bill. The appellant Burke claims a one-tenth interest, and the appellants Lamprecht and Aiken the remaining nine-tenths interest, in certain sections of land as placer mining claims under mining locations said to have been made in 1909. The appellees claim the land in question under patent of the United States issued to the appellee Southern Pacific Railroad Company in 1894 under the Act of Congress of July 27, 1866 (14 Stats. 292) and Joint Resolution of June 28, 1870 (16 Stats. 382), granting lands to said appellee in aid of the construction of its railroad. Both the amended bill and cross bill pray that said Act and Joint Resolution be construed and that the appellees be estopped from claiming any right, title or interest in or to said lands. The Circuit Court, Ross, C. J., sustained demurrers to the amended bill and the cross bill for want of equity, upon the opinion in *Roberts vs. Southern Pacific Company*, 186 Fed. 934 (printed as Ap-

pendix "C" hereto), a like case decided at the same time. From a decree dismissing the amended bill and cross bill appeals were taken to the Circuit Court of Appeals for the Ninth Circuit. The latter Court has certified seven questions, which are hereinafter stated, to this Court under Section 239 of the Judicial Code.

The following facts appear in the statement certified by the Court below as being allegations of the amended bill and cross bill:

On July 10, 1894, a patent was issued to the Railroad Company purporting to convey 3200 acres of the lands granted to it by the aforesaid Act of Congress, including the lands in controversy. Said patent contained the following clause:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

Prior to July 9, 1892, the lands in suit were covered by valid subsisting mining locations theretofore made by divers citizens of the United States, pursuant to the mining laws, and after

discovery of mineral thereon.* The Railroad Company, with notice of these mining claims, falsely and corruptly caused one Madden, its land agent, to make, and he did make, on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent were a correct list of lands inuring to the Railroad Company under the aforesaid land grant, and that the lands were vacant, unappropriated, and not interdicted or reserved lands. No notice of said application for patent was given to any of the owners of the mining locations then existing, and no hearing was had in the Land Office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and said patent was issued to the Railroad Company without any such investigation or determination. The prior locators of said mining claims having failed to perform their annual labor for the year 1908, the appellant Burke and his associates entered on said lands in March, 1909, and exercising for-

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* NOTE: It does not appear that these claims were recorded in the local United States Land Office or were anything more than locations under local regulations of the State or mining district. Appellant Burke in his brief (pp. 23, 323) claims only that they were recorded with the recorder of the State mining district.

feiture by reason of such failure of the prior locators relocated the same in accordance with the mining laws of the United States after making due discovery of mineral upon the land covered by each location. Prior thereto said land had been designated by the Department of the Interior as lands bearing mineral, to wit, petroleum, in commercial quantities and more valuable for mining than for agricultural purposes.

The cross-bill contained an additional allegation, as follows :

> "These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the

office of the Recorder of the County of Fresno and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part or any thereof."

The pertinent sections of the Act of July 27, 1866, and the full text of the Joint Resolution of June 28, 1870, are printed as Appendix "A" and Appendix "B," respectively, of this brief.

Criticism of Opposing Briefs.

Appellees petitioned this Court at the opening of the present term for a writ of certiorari directing the lower Court to certify to this Court for its consideration the entire record in these causes. This petition was opposed by appellant Burke, and was denied by the Court. Notwithstanding his own opposition to such petition and the Court's refusal to order up the whole record

for consideration, the appellant Burke has attached to his principal brief, as appendices, alleged copies of the amended bill of complaint, demurrer and patent (which are not included in the certificate before this Court), a deed given by the Railroad Company to a third party and the land office record underlying the patent in suit (neither of which constituted a part of the record in the court below), and throughout his various briefs refers indiscriminately to the certificate, the record below and the land office record of the patent proceedings, as well as to a multitude of supposed facts even more remotely removed from possible consideration by this Court.

The brief filed in behalf of the appellants Lamprecht and Aiken is also, although to a less extent, subject to criticism for its references to extraneous matters.

The brief filed by the United States as *amicus curiæ* is not based upon the certificate, or upon the record below, or upon any record except that which the Attorney General anticipates he may have the good fortune to make in a case against the Railroad Company in which he has just filed the bill of complaint in the United States District Court for the Southern District of Cali-

fornia. With the assurance of counsel for complainant, who has not yet even received the answer of his opponent, the Attorney General has inserted in his brief statement after statement, which he no doubt hopes to prove in the litigation which he has just commenced against the Railroad Company, but which the Railroad Company is equally certain are not facts and cannot be proved. If the appellees in this cause cannot in their presentation of the case go outside the facts stated in the certificate of the court below, it is not plain how an *amicus curiæ*, having no direct interest in the litigation, can be permitted in his brief to go outside of the certificate and outside of any record and allege in his brief, as established facts, statements as to which the appellees have had no day in court.

In 1892 the Railroad Company filed in the United States Land Office its application to patent the lands in question. After an examination pending in the Interior Department for a period of two years the patent was issued in 1894. Fifteen years later, in 1909, the appellants claimed the land as mineral, insisting that it did not pass by the patent of the United States issued as a result of the examination by the Interior Department. The appellants have no privity of

estate with the Government. The Railroad Company, having received a grant of land from the government upon certain conditions, having fully performed its part of the agreement, and having obtained a patent in fulfillment of the obligations of the United States, very properly resisted the claim. Notwithstanding these facts the brief of the United States on its last page contains the following:

> "Having prospered under the Nation's bounty, the railroad company now seeks to repudiate its solemn engagements, and claims that which was excluded from the operation of the grant and with its consent was excepted from the patents. This design will be resisted."

There would seem to be no occasion for this language. All that the appellees have done is to defend in good faith a patent issued to the Railroad Company by the Government eighteen years ago. The language of the Attorney-General is so uncalled for that the only possible explanation of it is that he is speaking of the bill of complaint filed by the United States against the Railroad Company, which presents other facts and an entirely

different aspect of the matter. In other words the brief of the Government has been filed, not for this case, but because of the pending litigation between the Railroad Company and the United States. This is borne out by the constant references in the brief to this new suit and the fact that the Government has attached to its brief a copy of the bill of complaint therein. The brief is filed in the hope of persuading the Court so to frame its opinion in the case at bar as to help, or at least not to hurt, the Government in its pending litigation. This is shown by the absolute refusal of the Government in any way to argue in its brief the sixth certified question which is vital to the case of the appellants. This is a virtual admission by the Government of the weakness of the position of the appellants and conclusively shows that the Government's brief was not filed with reference to the present controversy.

It is unparalleled in the whole history of judicial procedure for the Attorney-General of the United States to be permitted to intervene as *amicus curiæ* in a case between private litigants and then so to use the privilege granted him as to attempt to have decided issues not now before the Court, and which may or may not hereafter

come before it in a Government suit just begun against one of the parties to the case at bar. It is certainly unfair and unjust to the appellees to be compelled in this Court of last resort, not only to defend the present case, but also to defend another case arising upon entirely different facts, which has not proceeded beyond the filing of a bill of complaint. Especially is this so when the great seriousness and vast importance of this matter not only to the appellees but to all land grant railroads is considered. In this connection we desire to call the attention of the Court to an opinion rendered by the Attorney General to the Secretary of the Interior dated, March 29, 1911, in which he speaks with high approval of the decision of Judge Ross in the present case. This goes to show that his brief is not filed as a friend of the Court in this case, but as an aid to his own suit against the Railroad Company. We believe that this opinion of the Attorney General indicates his real judgment as to the present case better than his brief. It certainly is in accord with his predecessor in office at the time of the argument of the *Barden* case (154 U. S., 288), as appears by the brief of the Solicitor General, at page 296, *et seq.*, therein. As this opinion of the Attorney General has not

yet appeared among his printed opinions we print it here in full as Appendix "D" to this brief.

We have found it impossible within the reasonable limits of a brief to attempt to refer to the statements in opposing briefs of matters not justified by the record, or to discuss the authorities, upwards of 400 in number, cited by appellants. We shall, therefore, necessarily confine this brief strictly to the facts contained in the certificate and a discussion of the authorities which we consider pertinent, and we most earnestly urge that we shall not, by silence, be understood as conceding that any statements of fact in opposing briefs are founded upon the record, or as admitting the truth of any extraneous matters asserted therein or the accuracy of any interpretation placed by appellants upon any authorities cited by them.

ARGUMENT.

We believe that the convenience of the Court will best be served and brevity secured by discussing the case under two propositions which control the decision of the questions certified. A separate argument of each of the seven questions would involve unprofitable repetition. Separate reference to the various questions propounded by the lower Court (printed in full on pages 91 to 97 of this brief) is, therefore, postponed to a presentation of the two propositions which we believe sufficient for the disposition of the controversy.

POINT I.

The issue of a patent under this grant itself involves a determination by the Department of the Interior that the lands described therein are non-mineral lands and the presumption of such a determination is conclusive as against the appellants who are not in privity of estate with the Government.

By section 18 of the Act of July 27, 1866, 14 Statutes 292 (Appendix "A," p. 1), a grant

was made to the Southern Pacific Railroad Company to aid in the construction of its line. The grant as defined in Section 3 of that Act is a grant of "every alternate sec- "tion of public land, not mineral, designated "by odd numbers, to the amount of * * * "ten alternate sections of land per mile on "each side of said railroad whenever it passes "through any state, and whenever on the line "thereof the United States have full title, not re- "served, sold, granted, or otherwise appropriated, "and free from pre-emption or other claims or "rights, at the time the line of said road is des- "ignated by a plat thereof, filed in the office "of the Commissioner of the General Land "Office," with a proviso in the same section that "all mineral lands be, and the same are "hereby excluded from the operations of this "Act," and a further proviso that the word "mineral," as used in the Act, shall not be held to include iron or coal. Section 4 provided that, from time to time, whenever it should appear to the Commissioners appointed by the President of the United States that twenty-five consecutive miles of the railroad were completed in good, substantial and workmanlike manner, and as required by the Act, the Commissioners should so

report, under oath, to the President, and that patents should be issued to the Company "con-"firming to said Company the right and title "to said lands situated opposite to and co-termi-"nous with said completed section of said road."

A question having arisen whether the route designated by the Railroad Company in its map of definite location filed January 3, 1867, was authorized by its charter as it existed when the Act of 1866 was passed (*Southern Pacific Railroad Co. vs. United States*, 183 U. S. 519, 523), on June 28, 1870, a Joint Resolution, 16 Statutes 382 (Appendix B, p. iv), was passed and approved, which authorized the Railroad Company to construct its line on the route designated by the said map. This resolution also provided for the appointment of Commissioners by the President to examine each constructed section of railroad and declared that upon their report that such section had been constructed as required by law: "It shall be the duty of the "said Secretary of the Interior to cause patents "to be issued to said Company for the sections "of land co-terminous to each constructed "section reported on as aforesaid, to the extent "and amount granted to said Company by the "said Act of July 27, 1866, expressly saving

" and reserving all the rights of actual settlers, " together with the other conditions and re- " strictions provided for in the third section of " said Act."

The full text of the patent issued to the Railroad Company on July 10, 1894, is not included in the statement of facts certified to this Court. It appears in the certificate merely that on said date a patent purporting to convey certain lands so granted by Congress, including the lands in controversy herein, was issued from the United States to the Railroad Company and that the patent contained the clause hereinbefore quoted purporting to except and reserve mineral lands, other than coal and iron lands, should any such be found.

The effect of the issuance of the patent will first be considered irrespective of the mineral reservation clause included therein, since appellants deny that *any* patent issued under this grant could be effective to convey mineral lands.

1.

In the administration of the public land laws generally it has long been settled that the issue of a patent by the Department of the Interior, under an Act of Congress providing for the dis-

posal and patenting of public lands, is an official determination and declaration by the Department that the land so patented is of the character subject to disposition under such Act and that all statutory requirements preliminary to its issue have been complied with; and that this determination is conclusive except in a direct proceeding for its annulment or limitation brought by the Government or its privies.

In *Polk's Lessee vs. Wendal et al.*, 9 Cranch 87, Mr. Chief Justice MARSHALL said, at page 98:

> "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent issued by the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible and which every man has a right to draw from the existence of the grant itself."

In *Steel vs. Smelting Company*, 106 U. S. 447, an action to recover possession of land de-

rived from the Government under a mineral patent, the defendant asserting that the land was non-mineral and attacking the patent by charges of fraud, bribery and perjury, Mr. Justice FIELD said, at page 450:

> " We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been

the uniform language of this court in repeated decisions."

In *Smelting Co. vs. Kemp*, 104 U. S. 636, also an action for the recovery of land derived from the United States under a mineral land patent, the defendant introducing in evidence the record of proceedings in the Land Office, by which the said patent was obtained for the purpose of impeaching its validity, it was held that the admission of this record was erroneous, and the opinion of the Court, written by Mr. Justice FIELD, contains the following, at page 640:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

And at page 647:

> "If in issuing a patent its officers took mistaken views of the law, or drew errone-

ous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands (*Boggs v. Merced Mining Co.*, 14 Cal. 279, 363). It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

See, also,

French vs. Fyan, 93 U. S. 169, 171.
Lee vs. Johnson, 116 U. S. 48, 49.
Johnson vs. Towsley, 13 Wall. 72, 83.
Bohall vs. Dilla, 114 U. S. 47, 50.
Duluth & Iron Range R. Co. vs. Roy, 173 U. S. 587, 590.

It is unnecessary to multiply citations and quotations. Appellants do not deny the general

proposition and appear to admit its application under all land grants except those of which a railroad company, particularly the Southern Pacific Railroad Company, is beneficiary.

2.

The foregoing proposition as to the presumptions inherent in a patent, concerning the character of the land and other prerequisites of its issue, are fully applicable in the case of patents issued under the Southern Pacific Railroad grant, and parties not in privity with the Government are not entitled to attack such a patent upon allegations that there was no investigation or determination by the Department as to the character of the land or that the land was in fact mineral land.

It is argued in all the opposing briefs that there is a distinction between patents issued under special or direct grants, like the railroad land grants, and those issued under general public land laws which denies to the former class of patents the application of the presumptions of regularity attending patents of the latter class. There is no authority which sustains this assertion. It is admitted, however, that if the Department of the Interior had actually decided that the lands were non-mineral appellants would

have no right to show the decision erroneous (Brief for appellants Lamprecht and Aiken, p. 91; principal brief for appellant Burke, p. 95). It seems to us that this admission destroys the argument, for if an actual decision by the Department as to the character of the land is conclusive it must be because the Department has jurisdiction to decide the question of fact as a preliminary to the issue of patent, and in that event its patent necessarily implies that the fact has been decided. But whatever may be the effect of this admission by the appellants, there is no distinction between general grants and direct grants which affects the present question. The two classes of grants necessarily differ in many particulars, but there is at least one particular in which they do not differ in the slightest degree, and that is in respect of the duty and authority of the Department of the Interior to ascertain the character of the land before the issue of the patent and the consequent conclusive presumption of such ascertainment attending the issue of the patent. The homestead law, for example, provides that persons having certain qualifications "shall be entitled to enter" a specified quantity of unappropriated public land and im-

poses various requirements as to occupation, cultivation, etc., and then provides that upon compliance with the various requirements the entryman "shall be entitled to a patent" (R. S., Secs. 2289 to 2291). One of the conditions attaching to the homestead law is the provision of Section 2302: "nor shall any mineral lands be liable to entry and settlement under its [this chapter's] provisions." We do not find in the homestead law any specific grant of authority to the Department of the Interior to determine the non-mineral character of the land entered for homestead, and the reservation of mineral land from homestead entry and settlement seems to be as absolute as the reservation contained in the Southern Pacific Railroad grant. Yet it is conceded that it is the duty of the Department in the administration of the homestead law to adjudicate the character of the land and that its patent when issued conclusively establishes, as against colleral attack, that the land has been found to be non-mineral. It is true that the railroad grant is a grant *in praesenti* to a grantee specifically named, while the homestead law is a general offer to dispose of lands to a specified class of persons who desire to avail themselves of its benefit and who comply with its conditions.

But the rights of the homestead entryman are not derived from the Department of the Interior, or from its patent, but are derived from the statute as fully as the rights of the railroad grantee. "Where the right to a "patent has once become vested in a pur- "chaser of public lands, it is equivalent, so far "as the Government is concerned, to a patent "actually issued. The execution and delivery of "the patent after the right to it has become com- "plete are the mere ministerial acts of the officers "charged with that duty" (*Simmons vs. Wagner*, 101 U. S., 260, 261). The Act of 1866 does not in express terms direct the Secretary of the Interior to adjudicate the character of the land, but it directs the issue of patents for the lands granted, as the same shall be earned by the construction of the railroad, and a compliance with the direction to issue patents necessarily involves an identification of the lands defined by the grant, including, as fully as in the homestead law, a determination that the lands are non-mineral. The administration of the grant, without express direction to that effect, falls to the Department of the Interior (*Bishop of Nesqually vs. Gibbon*, 158 U. S., 155, 167). And in any event the Joint Resolution of June 28, 1870,

specifically named the Secretary of the Interior as the officer charged with the duty of issuing the patents. It is unnecessary to extend this brief by references to other general land laws, for the purpose of arguing as an original proposition the complete analogy between those laws and the railroad land grants in respect of the jurisdiction of the Department of the Interior to adjudicate the character of the land.

This Court has expressed most clearly in the majority opinion in *Barden vs. Northern Pacific Railroad Company*, 154 U. S. 288, its view that the general rules above stated as to the effect of patents apply to patents issued under the land grant to the Northern Pacific Railroad Company, which was a grant differing in no material particular in substance or language from the grant to the Southern Pacific Railroad Company. That case was an action by the Northern Pacific Railroad Company for the possession of certain parcels of land within its granted limits, this possessory right being asserted in advance of the issuance of a patent, the application therefor being pending with the Secretary of the Interior. The grant excepted mineral lands in terms identical with the exception in the Southern Pacific land

grant. It was admitted that the land had been discovered to be mineral, and that various persons, including the defendants, had filed mineral locations thereon, but the Company, nevertheless, claimed the right to recover this land because of the alleged fact that the land was not known to be mineral either at the time its map of definite location was filed or at the time it had filed its selections of these lands and application for the patent thereof. This Court overruled that contention, and held that the Company was not entitled to the possession of the land in view of its then known mineral character. It was argued, in behalf of the Company, that unless the mineral exception in the grant were limited to land known to be mineral at the time the grant took effect by the filing of the map of definite location, the title to the lands, even after patent, could be defeated by proof that the land was in fact mineral. In answer to this contention the majority opinion, written by Mr. Justice FIELD, says, in part, at page 321:

> "The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the Land Department, whose action is sub-

ject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the Interior. Under their direction and supervision the actual character of the land may be determined and fully established."

And, at pages 328, 329:

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent."

And, at page 329:

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy

whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

And at pages 330, 331:

"The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

Three Justices dissented, believing that the character of the land should be determined as of the time of definite location of the railroad, but nothing in the dissenting opinion indicates any disagreement with the views expressed by the majority that the issue of a patent would be conclusive as to the non-mineral character of the land. It is worthy of note also that the brief of the Solicitor General asserted the propositions that the titles of the company would not be left forever uncertain; that the Act contemplated that the Secretary of the Interior should determine the character of the land, and that after he has decided that the lands are not mineral, even if they are in fact mineral, and has issued a patent therefor, the title would not be liable to be defeated by the subsequent discovery of minerals (see abstract of brief at page 296), thus advancing the very propositions which were adopted in the majority opinion.

It is asserted by appellants that the *Barden* case holds that, by virtue of the absolute exclusion of mineral lands from the railroad land grant, title to lands which are in fact mineral can never pass under the grant. That such was not the holding of the Court is made perfectly clear by the comment upon that decision which

occurs in the opinion in *Shaw vs. Kellogg*, 170 U. S., 312, at 339, as follows:

> "Defendant relies largely on the decision of this court in Barden v. Northern Pacific Railroad, 154 U. S., 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or

non-mineral was open to consideration up to the time of issuing a patent. *But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals.*"

There is no room for doubt that the Court in the *Barden* case announced the view that, notwithstanding the mineral exception in the railroad land grant acts, it is within the jurisdiction of the Department of the Interior to determine the mineral or agricultural character of the land prior to the issue of a patent, and deliberately applied to railroad land grant patents the principle established under general land laws that the issue of the patent itself presumes, conclusively against collateral attack, an antecedent determination that the land was nonmineral. Since the determination so presumed is conclusive against those who are not in privity with the Government, it is not open to them to impeach the patent by alleging either that the Department made no determination as to the character of the land or that the land was in fact mineral land at the time of the issue of patent.

The gist of the rules announced in the various

cases on this subject might, we think, be accurately stated to be that the Secretary of the Interior is the agent of the Government, appointed and empowered to execute deeds to lands which are specified in general terms in the statute which constitutes his power of attorney. If, as such agent, he conveys, through fraud or mistake, lands which are within the general limits of his authority, but which for some reason were not in fact lands of the character which he was authorized to convey, his principal, the Government, may have the conveyance set aside by a court of equity. But, if the principal does not see fit to complain, or some one who had acquired from the principal a title, legal or equitable, prior to that created by the agent's fraudulent or mistaken conveyance, there is no one entitled to complain. The conveyance of the legal title being allowed by the principal, and all in privity with him, to stand, no title or right to the property can subsequently be acquired through the principal which will overcome the agent's conveyance, for every such right or title will be subsequent, and therefore subject, to the prior conveyance of the legal title.

To escape the effect of these propositions, the appellants profess to find in certain portions of the

opinion of Mr. Justice FIELD in the *Barden* case, authority for the proposition that there must be an *actual* investigation and determination by the Department as to the non-mineral character of the land, and an affirmative statement of such finding in the patent, and they conclude that, in the absence of such an affirmative finding and recital, the patent carries no presumption of the determination of that question, and that a subsequent mineral locator is entitled to set aside the patent by proof that the land was known to be mineral at the time it was issued. The Court did not decide or express any such proposition in the *Barden* case. The issue before the Court was merely whether the fact that the land was not known to be mineral at the time the railroad was definitely located, or at the time of filing the list of selections for patent, would definitely fix the non-mineral character of the land and warrant the issue of the patent, even if the mineral character was discovered thereafter. This was the only issue decided. But, in order to show that the result of the decision rendered on the point at issue would not forever leave in uncertainty and jeopardy the title to the land, the majority opinion indulged in the discussion of the conclusiveness of a patent, from which the above

quotations are made, and from some portions of which discussion the appellants seek to derive comfort. While the discussion of this subject was undoubtedly *obiter*, it was made with deliberation and for the purpose of destroying the principal argument against the correctness of the decision rendered, and the discussion is, therefore, entitled practically to the weight of an actual decision. The opinion undoubtedly does state that the Secretary of the Interior may make an investigation and determination as to mineral character, which he is, of course, supposed to make under the statute, and that the fact of such determination may be recited in the patent. But Mr. Justice FIELD certainly did not state or intend to state that, in the absence of an actual determination, or of an affirmative recital of such determination, a patent issued would not be entitled to the presumption, always accorded to such instruments, of the existence of all the prerequisites of its issue.

On the contrary, he says in that opinion, at page 330:

> "It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without

> fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

The appellants, we think, overlook the fact that Mr. Justice FIELD had in mind and was describing a procedure by which the patent could be made proof against attack by the Government, as well as proof against collateral attack by a stranger. He expressly states, at page 331, that a patent issued after due examination of the subject by the officers of the Department and a judgment rendered by them that the lands were non-mineral would estop *the Government* from contending to the contrary.

Furthermore, this argument is not available to appellants, for the patent in suit has not been embodied in the certificate before this Court and the facts certified do not show whether or not the patent recited that the land was agricultural.

Appellants further attempt to support their proposition by reference to the rule that the jurisdiction of courts of limited and special jurisdiction must affirmatively appear upon their judgments and records or they are nullities, and it

is argued that the Department of the Interior is a tribunal of special and limited jurisdiction; that a decision that the land patented was non-mineral is necessary to the jurisdiction of the Department to issue a patent, and that, therefore, unless it affirmatively appears by the patent that such finding was made, the patent is void. *This argument also encounters the difficulty above mentioned that the terms of the patent in this case are not before the Court.* The appellants are, however, mistaken both as to the nature of the rule and as to its applicability to the Interior Department. While the Interior Department has frequently been described as a special tribunal, or as a quasi-judicial tribunal, the facts remain that it is, in respect of the issue of patents, a purely administrative body, and that its act in issuing a patent is a mere ministerial function. There is certainly nothing about the railroad land grants which renders the exercise of the functions of the Department with reference to them any more judicial than the functions which the Department is called upon to exercise under most public land grants, but the contrary rather, and yet it has never been suggested under land laws generally that every fact which the Department is

required to determine prior to the issue of a patent must be affirmatively stated in the patent. We do not understand that the rule frequently announced to the effect that the issue of a patent presupposes the existence of all prerequisites to its issuance is derived in any sense from any supposed judicial character of the duty performed by the Department. The same presumption is indulged in the case of a conveyance by an agent acting under a power of attorney for an individual principal, *Clements vs. Machebœuf*, 92 U. S. 418, at page 425. And, while a person taking such a conveyance from an agent is not protected as against the principal unless the agent was acting within the scope of his authority, there has never been any rule of law requiring that such authority should be spread upon the instrument of conveyance. But, even if it be assumed that the Interior Department in these cases is a strictly judicial tribunal exercising limited and special jurisdiction, the rule cited by the appellants would not require affirmative proof of the determination of the non-mineral character of the land, or the affirmative statement in the patent that such a determination had been made. The rule relates to jurisdiction only. The rule in substance is that a

person seeking the benefit of the judgment of a court of special and limited jurisdiction must show that the court had jurisdiction of the subject matter and of the parties, and that this must affirmatively appear either *by evidence* or by proper averment in the record of the court, there being no presumption of law in favor of the jurisdiction of such a court. But it is not necessary that the facts establishing jurisdiction shall be recited in the judgment, or, even that they shall appear in any part of the record of the proceeding. If jurisdiction actually existed, proof thereof may be given extraneously (*Galpin vs. Page*, 18 Wall. 350, at page 366; *Van Deusen vs. Sweet*, 51 N. Y. 378, at page 385). And it is the rule in the case of inferior courts of special and limited jurisdiction, as well as in the case of superior courts of general jurisdiction, that "whenever it appears that a court possessing judicial powers, has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose" (*Harvey vs. Tyler*, 2 Wall. 328, at page 342). In granting the patent in suit the Department clearly had jurisdiction of the subject matter, for

such jurisdiction was conferred by the Act of Congress and by the Joint Resolution. These were admittedly public lands, and the Department was authorized to convey them if they were ascertained to be non-mineral lands as to which the United States had full title, free from pre-emption or other claims or rights, etc. The subject matter, therefore, was within the jurisdiction of the Department, and no question of jurisdiction of parties was involved. The identification of the land as non-mineral, or as free from pre-emption and other claim, and as within the twenty-mile limits of the grant, etc., were matters of fact necessarily presented for determination as incidental to the issuance of the patent, which represents the final judgment of the Department. These matters of fact would not present questions of jurisdiction. They are analogous to the facts which the plaintiff must prove in any action to establish his cause of action and entitle him to a judgment. If a court having jurisdiction of the subject matter and of the parties renders a judgment in the absence of proof of some fact essential to the cause of action, the judgment is erroneous and subject to correction upon appeal or by other direct attack by the proper procedure; but, if not so corrected, it is

absolutely conclusive, not only as against strangers to the litigation, but also as against the parties thereto. And so, if we erroneously assume that the Interior Department is a judicial body and subject to the rule invoked by the appellants, its failure to investigate the character of the land or its erroneous determination that the land was non-mineral would not impair the conclusive force and effect of the patent, except in a direct proceeding by the Government, or a party in privity with the Government, to set aside or correct the patent.

Much is said in the brief of appellant Burke as to the necessity of *some* evidence of non-mineral character to sustain a patent, which is an erroneous contention, for, as the Court said in *De Cambra vs. Rogers*, 189 U. S., 119, 122:

> "It is hardly necessary to say that, when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

Appellant is obliged by the authorities to admit (pp. 86, 124) that if there were even some perjured testimony, and nothing else, securing a

decision of the department through fraud, the patent would convey the legal title and could be cancelled only in a direct suit by the Government. As the certificate shows that the bill of complaint and cross-bill alleged that Madden, the land agent of the Railroad Company, made a false and fraudulent affidavit, in the application for this patent, to the effect that the lands were, *inter alia*, "not interdicted mineral or reserved lands," which allegation would ordinarily be deemed to disclose some evidence, the appellant, with characteristic ingenuity, discards this allegation from the case by the explanation that it "is not under consideration here," but that the allegation was made with reference to a question whether the lands were co-terminous to a completed twenty-five mile section of road.

3.

Appellants are not in privity with the Government and have therefore no standing to attack this patent. The allegations of the existence of mineral locations prior to patent do not affect the question.

All allegations as to the manner in which the patent was issued, and as to matters antecedent

to its issue, are immaterial. As to all the world, except the Government and its privies, as we have seen, the patent is conclusive. The rule is believed to be that a demurrer does not admit immaterial allegations, but it will be assumed for the purpose of the argument that all the allegations of the pleadings, as certified by the court below, are admitted by the demurrer.

The appellants' claims rest solely upon their so-called mineral locations made in March, 1909. The only information given concerning these so-called locations is that the appellants allege themselves to be the owners and entitled to the possession of certain described sections of land as placer mining claims under the mining laws of the United States, and that by reason of the failure of certain alleged prior locators of mining claims on this property to perform their annual labor for the year 1908, the appellants entered on said lands in March, 1909, and, exercising forfeiture by reason of such failure, relocated the same in accordance with the mining laws of the United States after making due discovery of mineral upon the land covered by each location. It is further alleged that the prior locations so forfeited and re-located by the appellants were made prior to July 9,

1892, and were on that date valid, subsisting mining locations. Section 2324 of the Revised Statutes provides for certain annual labor to be performed upon mining claims until the issue of patent, and that upon the failure to comply with these conditions the claim upon which such failure occurred "shall be open to relocation in the same manner as if no location of the same had ever been made." If it be assumed that the re-locations which the appellants claim to have made upon the forfeiture of the prior locators were in all respects made as required by law, nevertheless, the appellants acquired no priority by reason of the original locations made before the issue of the patent. Under the statute and by its express terms the relocation is an independent act and initiates a new title which dates only from the time of the re-location. The statute does not provide for any succession or privity of estate between the original locators and the relocator.

In *Lavagnino vs. Uhlig*, 198 U. S. 443, at page 452, this Court said :

> "It is elementary also that the power conferred by Section 2324 of the Revised

> Statutes, to re-locate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location."

Determining, therefore, the standing of the appellants as of the date of their alleged re-location, no entries or acts which they could then make or perform, could give them any right of possession or equitable interest in the land, for at the time the entire title had been conveyed to and vested in the Railroad Company. The land was not public land or open to entry for any purpose under any of the public land laws in March, 1909. It follows that so far from being in privity with the Government, the appellants are merely in the position of trespassers presuming to attack the patent issued fifteen years before their trespass began, basing their attack upon alleged irregularities committed in the proceeding in the Land Department to which they were not parties and in which they had no concern.

Any suit of the Government to vacate or annul the patent was barred by limitation in 1901 by the Act of March 2, 1896 (29 Stats. 42). This consideration emphasizes the extraordinary nature of the appellants' claims in that they seek

to establish an alleged right, which could be derived only from the Government, more than ten years after the Government had lost all opportunity to claim any rights in the premises.

The allegations as to the existence of mineral locations, made by prior locators, on July 9, 1892, when the Railroad Company filed its list of the granted lands to which it believed itself entitled and applied for patent thereof, serves no purpose except as an evidentiary allegation on an issue of the mineral character of the land, which issue is concluded by the issuance of the patent. The definite location of the railroad line was made on January 3, 1867, as shown by the Joint Resolution, Appendix "B," p. IV., and it does not appear that there were at that time any existing mineral locations which would operate to segregate the land from the public domain. The appellants are mistaken in thinking that the existence of mineral locations was important or given any consideration in the *Barden* case. The land there involved was admittedly mineral and the fact of the locations was of no additional importance except as the source of the defendant's claim to the right of possession.

It was held in *Northern Pacific Railroad Company vs. Sanders*, 166 U. S. 620, that a min-

ing claim existing *of record in the United States land office* at the time of filing of the map of definite location was a "claim" within the meaning of the granting act which operated to segregate the land subject to such location from the public domain and exclude it from the grant. But this was decided in a case in which the Railroad Company sought to recover upon such title as it possessed prior to the issue of a patent so that the question of the conclusiveness of the patent upon the subject of pre-existing claims and upon the subject of the character of the land was not presented. The *Sanders* case is further distinguishable from the present case in that the whole point of that decision was the pendency of these claims of record in the federal land office at the time of the definite location of the railroad, while in the present case the appellants have not alleged that the prior mineral locations on which they largely base their case existed at the time of definite location. In the *Sanders* case it appeared that the mineral locators not only had filed upon the land according to the laws of the Territory of Montana and the mining usages and customs then in force in the local mining district, but also had made a

filing of the land as mineral in the United States local land office and applied for patent therefor (166 U. S. at p. 624). The mining laws of the United States declare all mineral deposits in the public lands free and open to exploration and purchase by citizens (R. S., Sec. 2319). Locations which have not advanced beyond the possessory right acquired through compliance with local laws and regulations (R. S., Sec. 2322), are not required to be recorded in any federal land office, although they may sometimes be recorded in some State office under local laws or mining regulations (R. S., Sec. 2324). Application for patent may be filed, with proper proofs, in the local United States land office (R. S., Sec. 2325). Unless and until such filing occurs in the federal land office, the federal authorities have no record of the location and no information thereof except such as an actual examination of the land by some agent of the government may have disclosed. It is not pretended that there was any record in the federal land office of the mineral locations alleged to have existed prior to the patent in suit. The only material inquiry as to matters intervening between the date of the definite location of the railroad and the date of the issue of patent

is whether the land is in fact mineral; the fact that some one has located an experimental claim thereon is unimportant. Hence we reiterate that the allegations as to prior locations are merely evidentiary and that the issue of the patent renders the evidence immaterial.

POINT II.

The mineral land reservation clause in the patent is ineffective for any purpose.

Appellants argue that, even if the presumptions usually attending the issue of a patent are applicable, contrary to their first contention, to patents issued under a railroad land grant, the mineral land reservation clause contained in the patent in suit operates, upon divers theories advanced, to destroy the operation and effect which the patent would otherwise have. We contend that the patent has precisely the same force and effect as if this reservation clause were not inserted therein, and that this proposition has been definitely established by this Court.

The reservation clause is as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

1.

This reservation clause is not an assertion that the Department believed that any of the lands conveyed were mineral, and it does not repel the inference and presumption ordinarily inherent in a patent that the Department had made an investigation and determined that the land was non-mineral.

The theory is advanced by appellants that this clause is either a declaration by the Department that it believes some of the lands patented are mineral or a declaration that it has made no investigation or determination as to the character of the land.

This clause does not, upon a fair construction of its language, indicate any intention to exclude or vary the usual presumptions resulting from the issue of a patent. On the contrary, it is inconsistent with any view that the Department believed the land was mineral. The language

used expresses only futurity and possibility, and suggests no idea except a desire to reserve the benefit of chance discoveries in the future. The words "should any such be found" certainly do not mean "which have been found". A desire to reserve, if possible, mineral lands which might subsequently be discovered is entirely consistent with a previous investigation by the Department resulting in a *bona fide* belief and determination that none of the lands were mineral. Some light upon the purpose of this clause in line with the foregoing suggestion is shed by a report of the Land Commissioner quoted in *Merrill vs. Dixon*, 15 Nev., 401 (decided in 1880), at page 405, quoting from 2 Lester's Land Laws, page 337, as follows:

> "In every case reported from the district land officers, of selections made under the acts of 1862 and 1864, for the Pacific railroad, the agent of the company, in the first instance, is required to state in his affidavit that the selections are not interdicted, mineral, or reserved lands, and are of the character contemplated by the grant. Upon the filing of lists, with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections

in the particulars mentioned, and in other respects. They subsequently undergo scrutiny at this office, are tested by our plats, and by all the data on our files, sufficient time elapsing, after the selections are made, for the presentation of any objections to the department, before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet, excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.'"

It is evident that the original purpose of this clause was to reserve to the Government the benefit of future mineral discoveries regardless of the thoroughness with which the character of the land had been investigated by the Department in any particular case. But whether or not this was the original design, the insertion of the clause had become in 1894, when the patent in suit was issued, merely a habit. It is conceded in all opposing briefs that from the beginning of the administration of the railroad land grants reservation clauses of substantially this

language were inserted in all railroad patents and that this practice continued until 1903, when the clause was ordered eliminated from all future railroad patents by Secretary Hitchcock (32 Land Decisions, 342). The very uniformity of the practice conclusively shows that the clause was not intended as a declaration that the character of the land had not been investigated and adjudicated to the best of the Department's ability. The Department itself would hardly countenance, and has never advanced, such an explanation of the practice, one having the necessary effect of convicting the Department of deliberate violation of duty in every railroad land grant case which received its consideration.

There is nothing, therefore, in the clause itself which tends to overcome the presumption arising from the issue of the patent that the character of the land had been investigated, and that the Department had determined it to be non-mineral. But, even if the contrary construction of the language were admissible, the clause would still be ineffective to reserve mineral lands, then known or then unknown, from the operation of the patent because of the inherent nullity of the clause, discussed under the next subdivision.

2.

The insertion of this clause in the patent was absolutely unauthorized and it is null and void for all purposes.

It was the statutory duty of the officers of the Department as agents of the Government to issue patents conveying, immediately upon their identification, the lands granted by Congress. The language of Section 4 of the Act of 1866 is that after the Commissioners have reported as to the construction of the road "patents of lands, as aforesaid, shall "be issued to said Company, confirming to said "Company the right and title to said lands" and that upon the reports of the Commissioners, from time to time, that additional sections had been constructed, "then patents shall be issued "to said Company conveying the additional sec- "tions of land as aforesaid and so on as fast as "every twenty-five miles of said road is com- "pleted as aforesaid." The language of the Joint Resolution of 1870 is that upon the report of the Commissioners "it shall be the duty of the "said Secretary of the Interior to cause patents "to be issued to said Company for the sections "of land coterminous to each constructed section

"reported on as aforesaid," etc. This was no discretionary agency. The terms of the conveyance and the nature of the title to be conveyed were not left to the whim of the Department. This is emphasized by a consideration in detail of the matters imposed by the statute upon the land department in the administration of this grant, from which it appears that the functions of the Department under this grant are much more limited than in the administration of a general law, like the homestead or pre-emption laws, under which in any case a multitude of questions of fact susceptible of contest as well as numerous questions of law may be presented. The sole duty of the Department under this grant consists of the issuance of patents. The performance of this duty is necessarily dependent upon the ascertainment of a number of facts, all of which are incidental to an identification of the land granted. These facts are, (1) that the land was a part of the public domain; (2) that the sections were designated by odd numbers; (3) that they were within the granted twenty mile limits; (4) that they were not mineral; (5) that they had not been reserved, sold, granted, or otherwise appropriated and were free from pre-emption or other claims

or rights at the time of filing the map of definite location; (6) that the commissioners provided for by Section 4 and by the Joint Resolution had certified as to the completion of a twenty-five mile section of road; (7) that they were situated opposite to and coterminous with a twenty-five mile completed section of the road as certified by the commissioners. The foregoing enumeration is believed to include everything necessary for the determination of the Interior Department prior to the issuance of a patent, and it is plain that the function of the Department under the Act was the purely ministerial one of identifying the sections of land embraced within the grant as defined by Congress. There was no authority to add anything to or take anything from the conveyance directed by Congress. There was no authority to insert in a patent any other terms than those of conveyance and any appropriate recitals, and the title to be conveyed upon the identification of any particular sections within the grant was the whole title. This duty could not be enlarged or diminished by the Department at its pleasure. It might neglect the performance of the duty enjoined and refrain from acting at all, but, in the event that it did exercise the power which it

was directed to exercise, it could not by the insertion of any conditions or exceptions either evade the responsibility of passing upon the prerequisites of the exercise of its power, or create or reserve to the Government any reversionary interest to take effect upon the happening of future contingencies. The fact of the issuance of the patent conclusively imports, as we have stated, that the Department has identified the land as being within the twenty mile limits, as unappropriated, unsold, unreserved, ungranted, as free from pre-emption or other claims or rights, and as non-mineral. If the Department could insert in the patent an exception covering the mineral character of the land, it could embrace in such exception also all of the other matters which it was bound to decide, and the absurdity of the suggestion of the existence of any such authority or power is obvious.

The invalidity of this clause has been established by three decisions of this Court, and by decisions of the Circuit Court, and of the Land Department itself.

The ineffectiveness of the clause seems to have been first decided by Secretary LAMAR in the *Matter of Spong*, 5 Land Decisions, 193, decided in 1886. This case arose under the land grant

to the Central Pacific Railroad Company, which was a grant similar to the Southern Pacific Railroad grant. A patent had been issued for certain land to the Central Pacific Railroad Company in 1867 containing a mineral reservation clause excepting "all mineral lands, should any such be found to exist in the tracts described in the foregoing." Spong claimed to have found a gold lode on land covered by the patent, and that a placer mine had existed and been operated on the property before the land grant attached, and made application to purchase the land located by him as mineral. His application was denied, notwithstanding the exception in the patent, the Secretary saying:

> "While the exception of mineral lands from the grant is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may after the lapse of an indefinite number of years prove to be agricultural in character."

The same facts were thereafter presented in the case of *Cowell vs. Lammers*, 21 Fed. 200, in the U. S. Circuit Court, California District, SAWYER, C. J. The grantee of the Central Pa-

cific Railroad Company brought a suit in equity, to establish his title and right of possession against the defendants, claiming the discovery and right to develop the gold lode. It was held that the defendants were trespassers, that the land was not subject to location as a mining claim, and that the patent, notwithstanding its reservation clause, was conclusive against the collateral attack of the defendants. Judge SAWYER'S opinion is exhaustive and forceful. He said, in part, at page 205:

> "There is no express authority in the statute to issue a patent covering known mineral lands at all and no more authority to insert a clause in a patent issued, excepting or excluding therefrom, generally and indefinitely, without describing them so as to identify the exceptions made by the patent, 'mineral lands,' should any be found to exist in the tracts described. There is just as little authority for one as the other; as little authority for inserting the clause of exclusion, as for issuing any patent at all embracing mineral lands. Under the statute, it is as clearly the duty of the officers authorized to issue patents to the railroad companies to ascertain whether the lands patented are embraced in the congressional grant and

patentable, or are mineral lands and not patentable, as it is in the case of a pre-emption, homestead or other entry and sale of public lands, to ascertain the facts authorizing the issue of the patent."

And at page 206, 207:

"The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant, and be void as an exception. . . . If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15 years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee

or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question."

And at page 208:

"There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not. The most that can be said, then, is that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute, in no way enlarges or restricts those rights" * * *.

Appellants attempt to dispose of this decision of Judge SAWYER by showing that Judge SAWYER committed himself in subsequent decisions to the proposition that the railroad land grants excluded only mineral lands known to be such at the date of the definite location of the railroad, which view was subsequently rejected by this Court in the

Barden case. But the reasoning of the Court in *Cowell vs. Lammers* as to the validity of the mineral land reservation in the patent is not dependent upon or involved in any way with the question decided in the *Barden* case, which concerned the right of the railroad grantee before the issue of patent to recover the possession of land concededly mineral. It is not apparent that the soundness of the reasoning of a judge upon one question of law should be deemed impaired by the fact that upon a different question of law his view has not been sustained by this Court.

In *Davis's Administrator vs. Weibbold*, 139 U. S., 507, Mr. Justice FIELD writing the unanimous opinion of the Court, expressly approved the decision of Judge SAWYER in *Cowell vs. Lammers* (*supra*),. This case, also, contains an actual decision by this Court of the principle involved in the attempted reservation and a determination against the validity of the clause. The case involved an action for possession of a quartz lode. The plaintiff had a mineral patent, issued in 1880, upon an entry made in 1878. The defendant claimed under a townsite patent issued in 1877. A decision in favor of the plaintiff was reversed and the case remanded for a new

trial because of errors in the exclusion of evidence offered by the defendant. It appeared that the plaintiff's mineral patent contained an exception clause, "excluding, however, from these presents "all town property rights upon the surface, and "there are expressly excepted and excluded "from the same all houses, buildings, structures, "lots, blocks, streets, alleys, or other municipal "improvements on the surface of the above de- "scribed premises not belonging to the grantee "herein and all rights necessary or proper to "the occupation, possession and enjoyment of "the same." Upon the question whether the patent should have been excluded when offered in evidence, because it excepted the rights claimed by defendant and therefore did not establish plaintiff's title, the Court said, at pages 527, 528:

> "But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the Government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge

their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers."

In *Deffeback vs. Hawke*, 115 U. S., 392, the case was a suit by a patentee of a placer mining claim to recover possession. After his filing under the mining laws, which subsequently ripened into patent, a townsite was platted under the Federal laws. The defendant claimed under the townsite proceedings. In those proceedings the General Land Office had held a hearing as to the mineral character of the land and had decided the issue in favor of the plaintiff and issued the patent to him. The defendant claiming title to his improvements continued his occupation, notwithstanding this decision. The real question in the case arose upon defendant's contention that the patent to the plaintiff should have excepted and reserved the buildings and other improvements placed upon the land by the defendant or his predecessors. This Court held that this con-

tention had no support in any legislation of Congress and said, at page 406:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface."

It is true that in his opinion in the *Barden* case Mr. Justice FIELD pointed out that the townsite laws involved in *Deffeback vs. Hawke* and *Davis vs. Weibbold*, differed from the railroad land grants to such an extent that not all the reasoning of the opinions in those cases was applicable to a case under a railroad grant, but in the same connection, speaking particularly of the decision in *Davis vs. Weibbold*, Mr. Justice FIELD said in the *Barden* case, 154 U. S., at page 324:

> "Yet the effect given to the townsite patent will be found not inconsistent with the views hereafter expressed in the present case."

And in any event the differences between the townsite law and the railroad land grants, to which Mr. Justice FIELD adverted, does not affect the views expressed by this Court, as above quoted, in the two townsite cases concerning the want of authority in agents of the government to insert exceptions and reservations in the patents issued by them.

The same question was again presented to this Court for decision in *Shaw vs. Kellogg*, 170 U. S. 312. This was an ejectment action to recover a section of land in the so-called Baca grant No. 4, which included certain mineral bearing property designated as the Eastern Star Mine and adjacent mining lands. Prior to the treaty of Guadalupe Hidalgo, Mexico had made grants of land within the territory ceded. By Act of June 21, 1860 (12 Statutes, 71), Congress confirmed several of these grants. There were opposing claimants for one tract, and the Act provided that the heirs of the claimant Baca should select, instead of the land claimed by them, an equal quantity "of vacant land, *not mineral*, in the Territory of New Mexico," and that it should be the duty of the Surveyor General of New Mexico to make survey and location

of the lands so selected when thereunto required by the Baca heirs. December 12, 1862, a selection was filed in behalf of the Baca heirs, which contained a statement that the land was vacant and not mineral and applied for the survey and location of the tract in accordance with the provisions of the Act of Congress. Some intimation having been received by the Department that the location might cover mineral deposits, very specific instructions were issued to the Surveyor General as to the necessity of showing that the land was not mineral. The Surveyor General thereafter transmitted his certificate that the lands were not mineral and were vacant, and in his letter of transmittal explained the grounds upon which he made the non-mineral certificate. His explanation showed that he had made no personal investigation, but relied chiefly on the absence of mineral discoveries by others. The local Register and Receiver also made a formal non-mineral certificate. The Department at first rejected the Surveyor General's certificate as based merely upon information and conclusions. Later, apparently without receiving any additional certificate, but realizing that the grantees were entitled to action, the Department directed the Surveyor General to file the original

field notes of the survey, duly verified and authenticated, and thereupon in accordance with the Act of June 21, 1860, to approve the survey, but in his certificate of approval to add the special reservation contained in the statute as to its not embracing mineral land or interfering with any other vested rights if such existed. The Department expressed the opinion that the statute did not authorize the issue of a patent and that the plat approved by the Surveyor General would constitute the evidence of title. Accordingly the field notes and a map of the survey, certified and approved by the Surveyor General, were filed in 1864. His certificate of approval stated that the same had been examined and approved, "*subject to the conditions* "*and provisions of Section 6 of the Act of Con-* "*gress, approved June 21, 1860.*" The Eastern Star Mine was discovered in 1876 and a certificate of location filed, but upon ascertaining that this location was within the limits of the Baca grant, the locators abandoned the mine. The owners of the grant thereafter made various leases of the mine. In 1887 the defendant took from the management of the grant a verbal lease for three months, and being refused a renewal remained in possession without authority.

It was to recover this possession that the action was brought. This Court unanimously held that the title of the Baca grantees was not subject to challenge, but was "full, absolute and "unconditional." The contentions were made that Congress had granted only non-mineral land; that the tract was mineral and so not within the grant, and that the Land Department had never adjudicated its non-mineral character, but, on the contrary, had approved the location, *subject to* the conditions and provisions of the Act of Congress. The similarity of the contentions there made with the contentions made by the appellants in the present case is noteworthy. This Court, in considering the limits placed by the Act of Congress upon the grantee's right of location, held that the grantees were not at liberty to select lands which were then known to contain mineral, and said, at pages 332, 333:

> "We say 'lands then known to contain mineral', for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend

that the title, when it passed, should pass absolutely and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands; but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

It was pointed out that upon the Surveyor General was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select, subject to the control and direction of the Land Department, and that he had certified that the land was non-mineral. The Court commented on the suspicions entertained by the Department as to the character of the land, and there was clearly no doubt in the mind of this Court that the reservation clause was inserted in the Surveyor General's certificate deliberately for the purpose of protecting the interests of the Government. The Court then proceeded to consider the significance and effect of the reservation clause and said, at pages 337–338:

" We are of opinion that the insertion of any such stipulation and limitation was be-

yond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approv-

ing any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether."

It was held also that, although no patent had been issued, the filing of the certificate and its approval as the evidence of title provided by the statute in that case must be treated as having all the efficacy of a patent. The Court said further, at page 343:

> "While the approval entered upon the plat by the surveyor general under the direction of the Land Department was in terms 'subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860,' such limitation was beyond the power of executive officers to impose."

We are utterly unable to conceive how the decision in *Shaw vs. Kellogg*, *supra*, can be distinguished from the present case. The Act of Con-

gress making the grant to the Baca heirs excepted mineral lands from the operation of the grant in the same terms as the exception in the Southern Pacific Railroad grant. The exception was absolute and not an exception of such lands as the Surveyor General should determine to be non-mineral, that is, the mineral character was not expressly made dependent upon the finding of the Surveyor General, but it became his duty to decide the question in the same manner in which the duty of the Land Department to make such decisions arises under the railroad land grants, simply by force of the fact that he was the agent designated by Congress to perfect the conveyance. While the language of the reservation in the Surveyor General's certificate of approval is, of course, entirely different from that of the patent in suit, the difference is not important, for they were both made for the same purpose, and they were equally well calculated, so far as their language was concerned, to effect the desired purpose.

The formal certificate made by the Surveyor General that the land was non-mineral is not sufficient to distinguish *Shaw vs. Kellogg* from the present case, although the assertion that there was in that case an actual finding of non-mineral character is the chief reliance of the

appellants in this case as a distinguishing point. The Surveyor General's explanation accompanying his technical certificate to the Department showed that he had not made an actual investigation as to the character of the land, and no fact stands out more clearly in that case than the fact that the Department did not consider his report a sufficient finding as to the character of the land and refused to accept it as such. If a failure to make an actual determination were material, as claimed by appellants here, the case presented in *Shaw vs. Kellogg* would have been much more favorable to the mineral claimants than is the present case, for it was perfectly obvious from the evidence in that case that the department did not consider that the character of the land had been satisfactorily ascertained, and, for the express purpose of saving the rights of the government, dictated the reservation which was embodied in the certificate of approval under which the Baca grantees obtained their title. The decision of this Court in *Shaw vs. Kellogg* did not in the slightest degree rest upon any assumption by the Court that the surveyor general or the Department had determined that the land was non-mineral. It will be noticed that no such consideration entered into

the discussion of the question of the significance and effect of the reservation clause, the greater part of which discussion is quoted above. The decision of that question was placed squarely upon the absolute want of authority to make the conveyance subject to any such reservation, to annex any condition to the unconditional grant made by Congress.

In view of the reiterated arguments in opposing briefs based upon the differences between the nature of the railroad land grants and the grants made under general land laws, it is pertinent to observe that the Baca grant involved in *Shaw vs. Kellogg* was essentially a special and direct grant. And yet this Court attributed to the certificate of approval in that case (treated as the equivalent of a patent) all the presumptions and the effect of conclusiveness which are accorded to patents issued under general laws.

It is argued by appellants that the insertion of a mineral land exception in the land grant patents confirms the very title which Congress intended to grant, and merely gives effect to the intent of the granting statute, but that consideration was equally applicable to the case presented in *Shaw vs. Kellogg* and is necessarily

overcome by the other considerations which this Court considered controlling.

While it is impossible to add to the authority of the decisions above cited, it is pertinent to observe that the same view has obtained in the Department of the Interior. In *Courtright vs. Wisconsin Central Railroad Co.*, 19 Land Decisions 410, Secretary Smith, in 1894, denied an application to make a soldier's additional homestead entry on a tract patented under a railroad land grant, the patent containing a reservation clause in practically the same language as the clause in suit. The Secretary said, at page 412:

> "If it was the intention of the officers to leave the character of the lands as an open question then they acted without authority, for the issue of the patent ended their jurisdiction and power to hear and determine any question relating to these lands."

Notwithstanding this decision of Secretary Smith, the practice of inserting the usual reservation clause continued until 1903, when it was abolished by Secretary Hitchcock upon an application of the Northern Pacific Railway Company for the discontinuance of that practice. After a full consideration of the question the Secretary directed that in the future the clause

be excluded from all railroad land grant patents (32 Land Decisions, 342).

There are a few state and territorial court decisions upon which appellants rely, which are more or less in their favor. *Chicago Quartz Mining Co. vs. Oliver*, 75 Cal. 194; *McLaughlin vs. Powell*, 50 Cal. 64, and *Van Ness vs. Rooney*, 160 Cal. 131, treated similar mineral reservation clauses in railroad land grant patents as operating to reserve mineral land from the conveyance, but in none of these cases does the court discuss the proposition that the Department was without power to insert such a reservation in the patent or consider the decisions of this Court which have so held. And in *Paterson vs. Ogden*, 141 Cal. 43, 45, the same Court refers to Judge SAWYER'S decision in *Cowell vs. Lammers* (*supra*), that the clause is void, and appears to consider the question an open one.

Kansas City Mining & Milling Co. vs. Clay, 3 Arizona, 326, cited by appellants, involved no question of a reservation clause in a patent, and was practically, although not expressly, overruled by the same Court in *Old Dominion Copper Co. vs. Haverly*, 11 Arizona, 241.

This question, however, is a federal question, and, even if these state and territorial court de-

cisions by their reasoning commended themselves more strongly to consideration, as said in *Gale vs. Best*, 78 Cal. 235, 240, the views of this Court upon the proposition must prevail.

In *Eastern Oregon Land Company vs. Willow River Land & Irrigation Company*, the question of a mineral land reservation in a wagon road grant was considered by Judge BEAN in the Circuit Court for the District of Oregon, 187 Fed., 466. The defendant in that case had pleaded that the land in controversy was known to be mineral land at the date of the wagon road grant under which the complainant derived title. Judge BEAN dismissed the suit on the grounds, first, that the complainant had an adequate remedy at law, and, second, that the complainant had not shown that it would be substantially injured by the impounding of waters proposed by the defendant, to enjoin which the suit was instituted. Judge BEAN was of the opinion that the mineral land exception in the patent repelled the ordinary inference and presumption that the department determined the land to be non-mineral. This view of the meaning and intent of the reservation clause was advanced without discussion and without citation of authorities. Its expression does not seem to

have been essential to the decision of the case in view of the grounds upon which the decision was actually rested. This decision has been reversed upon appeal by the Circuit Court of Appeals for the Ninth Circuit, opinions filed November 1, 1912, and not yet reported. Circuit Judges ROSS and MORROW concurred in the reversal. The former reiterated his views as expressed in *Roberts vs. Southern Pacific Co.*, 186 Fed., 934, as to the invalidity of the mineral land exception, and Judge MORROW refrained from a discussion of that question, believing that the complainant was entitled to a reversal upon grounds not pertinent to the present inquiry. A dissenting opinion was filed by Circuit Judge GILBERT in which, *inter alia*, he concurs briefly in Judge BEAN'S view that the reservation clause should be construed as repelling the inference that the department had adjudicated the character of the land. The opinions of District Judge BEAN and Circuit Judge GILBERT on this point do not require serious consideration. It is not apparent from their discussion of the question that the pertinent authorities had been called to their attention.

Reference is made in opposing briefs to the condition commonly inserted in patents of placer mining claims to the effect that should any

vein or lode be claimed or known to exist at the date of the patent within the premises described in the patent the same is expressly excluded from the patent. These patents are issued under a peculiar statute which excludes veins or lodes from acquisition under a placer claim unless the applicant for the placer mine patent specifies the vein or lode in his application and pays the slightly increased price required for the purchase of vein or lode claims. The statute then provides that where a vein or lode is known to exist within the boundaries of the placer claim and the applicant does not so include the vein or lode in his application, his application " shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim " (R. S., Sec. 2333). Under this peculiar statute the effect of course will be the same whether or not a reservation of vein or lode claims is expressed in the placer mine patent, since the intent of the statute will in all cases have effect *ex proprio vigore*. This Court has had no occasion to decide, and, in view of the terms of that statute, never will have occasion to decide, any question as to the validity of that condition

in the patent, and no argument can be deduced from the practice of the Department in embodying the condition in the patent.

3.

The final clause of the Joint Resolution of 1870 was not a direction that this express reservation of mineral lands should be inserted in patents issued under the grant.

The Joint Resolution, (Appendix "B," p. iv.), after authorizing the Southern Pacific Railroad Company to construct its road on the route indicated by the map filed January 3, 1867, and directing the issue of patents for the lands co-terminous with each constructed section to the extent and amount granted in the Act of 1866, closes with the following language:

> "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said Act."

It is argued that the language quoted was a direction to the Secretary of the Interior to insert this express reservation in all patents. A consideration of the history of the matter and an examination of the circumstances under which this

language was incorporated in the Joint Rosolution completely dispose of the contention.

The Secretary of the Interior refused to approve the map of definite location filed by the Railroad Company on January 3, 1867, on the ground that part of the route designated was not authorized by the charter of the Southern Pacific Railroad Company. On April 4, 1870 (California Statutes, 1869–1870, p. 883) the California State Legislature approved the route adopted by the Company, and thereupon the Company applied to Congress for the legalization of the route shown on the map of January 3, 1867. In the meantime the adjacent land had been withdrawn from entry by the Secretary of the Interior shortly after the filing of the map.

The resolution as reported by the Senate Committee was as follows:

> "That the Southern Pacific Railroad Company of California shall construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the 3rd day of January, 1867; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination

of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said Company, approved July 27, 1866, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land co-terminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866."

The obvious and avowed purpose of this resolution was to legalize the route adopted by the map of 1867 and remove any doubt that the land grant in the Act of 1866 applied to this route. It is to be observed that its form as reported included the direction to the Secretary of the Interior to issue patents but did not couple that direction with any saving or exception clause. Senator Cole offered as an amendment the addition of the saving clause above quoted. Senator Casserly offered an amendment to the Cole amendment, in substance saving the rights of all who had located as settlers adjacent to the route as legalized whether they had made their

settlement before or after the Secretary's withdrawal of the land from entry consequent upon the filing of the railroad map. In the debate which followed Senator Casserly maintained that Senator Cole's amendment did not quiet a controversy which had arisen as to the legality of the withdrawal order and saved only the rights of those whose settlements were prior to the withdrawal order and that they were sufficiently protected by the exceptions in the Act of 1866. Senator Cole argued that his amendment protected the rights of those who had settled previously to the withdrawal of the land in 1867; that the Casserly amendment was calculated to aid locators who were merely speculating upon the illegality of the order of withdrawal and entitled to no protection; that the railroad company had expended several million dollars on the faith of the land grant attaching to this route and that its grant should not be curtailed as proposed by the Casserly amendment. The Casserly amendment was defeated and the Cole amendment was adopted. The resolution as so amended was passed by the Senate and concurred in by the House. The only subject of debate was the propriety of saving the rights of settlers. Senator Cole's amendment was designed to confirm the exceptions in the Act of

1866 and to add to the original exceptions a saving of the rights of *bona fide* settlers on the land adjacent to the new route who might not have initiated legal pre-emption or homestead claims. The Attorney-General so construed the saving clause (16 Attorney-General's Opinions 80). Not one word was said in the debate as to any supposed necessity of inserting an express exception in patents when issued, or anything whatever on the subject of the form of patents. The proceedings in the Senate and House show beyond the possibility of question that the only matters under consideration and which the legislation as adopted was designed to remedy were the doubt as to the legality of the route definitely located by the Railroad Company and the protection of the unperfected rights of certain settlers which would otherwise be cut off by the resolution.

The reservation "expressly" made in the Joint Resolution, therefore, refers to the grant made or confirmed therein and not to the phraseology of patents to be issued. There were no facts before Congress which suggested any necessity of regulating the form of patents (See *Congressional Globe*, 2nd Session of 41st Congress, Parts 4 and 5, pages 3349, 3350, 3828, 3950 to 3953, 4700, 4701).

The propriety of the examination of the debates in Congress for the purpose of ascertaining the circumstances surrounding the adoption of certain legislation, and the evil designed to be remedied, as a means of learning the probable scope and intent of the legislation cannot be questioned (*Binns vs. United States*, 194 U. S. 486; *Holy Trinity Church vs. United States*, 143 U. S. 457, 464).

It might be added that if this saving clause were a direction that the patent should contain an express reservation, the Department has never complied with the instruction, for such a compliance upon this theory would require that the patent should expressly save and reserve, not only mineral lands, if any such should be found to exist, but also the rights of actual settlers, lands reserved, sold, granted, or otherwise appropriated, lands subject to pre-emption, or other claims or rights, at the time the line of said road was designated by a plat thereof, etc. The result of such a construction of the saving clause of the Joint Resolution is too preposterous to permit of serious consideration of the construction advanced.

It is stated in opposing briefs that the practice of inserting this exception in patents began prior to 1870. If this is true it is of course

absurd for appellants to contend that the exception was inserted pursuant to or because of any belief that the concluding clause of the resolution of 1870 constituted a direction for the insertion of an express exception.

4.

There is no agreement or estoppel by which this reservation clause can derive validity.

The certificate quotes an allegation made by the cross-bill to the effect that the Railroad Company, with full knowledge of all the facts, accepted and agreed to be bound by the conditions and reservations contained in the Act of Congress, the Joint Resolution and the patent, and accepted said patent and caused the same to be recorded, and is therefore estopped to resist or deny the binding force and effect of the same or any part thereof. The allegation is quoted in full in the statement of facts at the beginning of this brief. This allegation gives no validity by force of agreement or estoppel to the reservation clause. Upon a consideration of the full text of this allegation, it requires no imagination to perceive that it is merely the pleader's conclusion concerning the effect of an acceptance of the patent containing this clause and as such not

admitted by demurrer (*Equitable Life Assurance Society vs. Brown*, 213 U. S. 25, 43). The Court below has, however, certified a question which contemplates the existence of an express agreement between the Railroad Company and the officers of the Department that the clause should be effective to keep in the United States title to such of the lands as were in fact mineral. There is no basis for such a premise. By no amount of liberality of construction can the allegation on this subject in the cross bill be interpreted as an allegation of the making of an express contract.

Even if there were any facts before the Court indicating an express agreement of this character on the part of the Railroad Company, the difficulty would remain that there was no possible consideration for such an agreement. Assuming that the reservation clause could, by the consent of the grantee, be made effective to reserve actual mineral land, the Railroad Company could acquire no title by virtue of the patent, and any such promise or consent by the Railroad Company as is sought to be assumed could hardly be deemed to derive a supporting consideration from the issue by the Government of a document which then, on the

appellants' own theory, would be nothing but an express declaration that no title was conveyed. Unless previous decisions of this Court are to be retracted, the reservation was void on its face, and the patent was, on its face, a complete and perfect conveyance, and upon this premise the conclusion is obvious that the effect of the conveyance could not be altered by any collateral understanding, and that parol evidence of any understanding contrary to the terms of the patent would be inadmissible. Furthermore, the officials of the land department possess no more authority to enter into an agreement of this character than they possess to enforce such a reservation by inserting it as an express condition in the patent. They owed no duty to any one except their official duty to do what the law and the regulations empowered and directed them to do—that is, to determine the character of the land and to issue patents unconditionally conveying title, or to refuse such patents. Any other action on their part in the premises would be *ultra vires* and not binding on the government, and therefore not binding on the other party to the supposed contract, unless we are to have a departure from the accepted elementary principles of contract law.

It is clear that no estoppel could result from the acceptance of the patent embodying this clause. The patentee was entitled to rely upon the inherent invalidity of the clause, upon the Land Department's own view of the ineffectiveness of the clause instanced by the decision in *Matter of Spong*, 5 Land Decisions, 193, *supra*, and upon the practice of the Department of inserting the clause in all patents as a formality and of investigating the character of the land and refusing to issue a patent whenever it was believed to be mineral. There are no facts before the Court from which it can be concluded that the government has suffered any change of position in reliance upon the action of the Railroad Company in accepting this patent, such as is necessary to constitute an essential element of an estoppel. It is not apparent that the government has ever relied upon any claim that the Railroad Company conceded the validity of the mineral land reservation in a patent. The practice of the land department is inconsistent with any such claim. The department has uniformly refused to issue patents for lands known to be mineral. The decision of Secretary Hitchcock in 1903 that this clause should thereafter be omitted from railroad land

grant patents (32 Land Decisions 342) could not possibly have been made in the face of any understanding in the department that any land grant railroads had expressly or impliedly agreed that the reservation clause in the patents issued should be effective.

The patentee has no voice in the form of a patent, and any protest as to the insertion of a provision deemed objectionable would be unavailing. This patent was issued twenty-eight years after the grant and many years after the road was completed. Against the inaction of the Department during this long period, and against the objectionable form of this action when taken, the grantee had no redress.

And the last word on this point is that the appellants have not the privity of estate with the Government, which alone would entitle them to enforce an estoppel or to obtain the advantage of any contract between the grantor and the grantee.

Questions Certified.

FIRST QUESTION: "*Did the said grant to the Southern Pacific Railroad Company, include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?*"

We should not be disposed to quarrel with a negative answer to this question considered as an abstract proposition. It was decided by this Court in the *Barden* case, *supra*, that the grant did not include mineral lands, which were known to be such prior to patent. But it is certainly unnecessary to answer this question. Literally read, it is inconceivable that the Court below is in doubt about the proposition and is divided in opinion, as it has certified. This suggests the thought that the question is improperly framed and was intended by the lower Court to have some meaning beyond its apparent literal meaning. At any rate, it appears to us that a negative answer to the question as framed would almost certainly be misconstrued, for, reading the question and a negative answer in connection with the facts of the case, it would naturally be supposed by any persons not actual participants in this litigation that such an answer meant that mineral lands known to be such at the time of the patent, not being included in the grant, did not under any circumstances pass under the patent. If the question were merely " Did the said grant to the Southern Pacific Railroad Company include mineral lands?", without any reference in the

question to the issue of a patent, it would be less objectionable.

SECOND QUESTION: "*Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?*"

This question also seems to us objectionable in form and inappropriate. It presents no distinction as between direct attack by the government and collateral attack by strangers, and is not susceptible of a categorical answer. The question is based upon premises which are immaterial. In view of the Fourth Question, an answer to the Second Question is unnecessary. If it is answered at all, it should be answered in the affirmative, for the patent undoubtedly does operate to convey the legal title to the lands whether or not the Department had made an investigation as to their character.

THIRD QUESTION: "*Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?*"

This question appears to present accurately (except as to its unnecessary reference to "the grant") one of the propositions involved in this case and should be answered in the affirmative.

FOURTH QUESTION: "*If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?*"

This question is appropriate and should be answered in the affirmative.

FIFTH QUESTION: "*Is petroleum or mineral oil within the meaning of the term mineral as it was used in said Acts of Congress reserving mineral land from the railroad land grants?*"

This question has no basis in the record and is absolutely improper. The word "petroleum" occurs once in the facts certified. In connection with the allegations as to the mineral re-locations by the appellants in 1909, it is alleged "that prior

thereto said land had been properly and legally designated by the Department of the Interior as lands bearing mineral, to wit, petroleum, in commercial quantities." The allegation quoted is a piece of gratuitous information, or misinformation, as the case may be. The appellants do not allege that their locations, or the prior locations said to have existed in 1892, had anything to do with petroleum. They are alleged to have been "mineral" locations and made upon discovery of "mineral" and to be placer mining claims. The additional fact, if it is a fact, that the Department has designated any of this land as "mineral" upon the theory that petroleum is a "mineral" is quite immaterial.

But further, if the Court desired to decide this question, there is nothing in the record upon which such a decision can be made. The question is framed as a question of law, but it necessarily includes, if it is not exclusively, a question of fact. The Act of Congress says nothing about petroleum and contains no definition of the term "mineral." The question as certified assumes that petroleum is a mineral oil, but it is at least a question of fact whether petroleum is a mineral product or a vegetable product, and, if it is permissible to refer to the opinions of sci-

entists, we believe that the consensus of present scientific opinion would appear to be that petroleum generally is a vegetable product and that California petroleum is purely animal in its derivation. Whether petroleum is a mineral oil is a question of fact which must be determined by a jury if conflicting evidence appears. (See *Farquharson vs. Barnard Argue, etc., Co.*, 22 Ont. Law Reports, 319, affirmed by Privy Council, 28 Law Times Rep., 590; *Symington vs. Caledonian Ry. Co.*, Law Reports, 1912, Appeal Cases, 87, 93). In the event of an affirmative decision of that fact by a jury or in the event of the submission of uncontroverted evidence to that effect, the question of law would then be presented whether, notwithstanding petroleum appeared to be a mineral product, it was within the meaning of the exception in the land grant. The natural assumption on that question would be that Congress had in mind only such substances as were then generally and in the common understanding classed as minerals and as were subject to location as minerals under the public land laws, and petroleum was not within that class.

The question of fact and the question of law above indicated may be presented and require

determination in some case, but their decision in this case is neither necessary nor possible.

Rule 37 of this Court provides that upon the certificate of questions by the Circuit Court of Appeals there shall be transmitted by that Court "a proper statement of the facts on which such question or proposition of law arises." There is no such statement of the facts in connection with this petroleum question in the certificate in this case. And whether considered as a pure question of fact or as a mixed question of law and fact, it is improperly certified (*United States vs. Union Pacific Railway Company*, 168 U. S. 505, 512).

SIXTH QUESTION: "*Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.*"

This question is appropriate and should be answered in the affirmative.

SEVENTH QUESTION: "*If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Rail-*

road Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

If this question is answered, it should be answered in the negative, but it seems to us, as already argued, that it is not presented by the certificate, but is clearly an hypothetical question not supported by any facts contained in the certificate as required by Rule 37.

Conclusion.

We submit that the seven questions certified are subject to so many objections as to form, and and are in some instances so inappropriate, that this Court should require the whole record and cause to be sent up and decide the whole controversy under the jurisdiction conferred by Section 239 of the Judiciary Act of 1911. Although the questions which are controlling in this case

have already been repeatedly decided by this Court, attacks upon the patents issued under the railroad land grants continue to be made periodically and persistently, and the large amount of land conveyed under patents containing mineral reservation clauses requires that the principle involved should be finally and conclusively determined. The matter can be more definitely and emphatically disposed of by a decision of this Court upon the whole case than by its opinion embarrassed by the form of certified questions or by any decision of the Circuit Court of Appeals based upon the answers of this Court to such certified questions.

But, if the Court prefers to dispose of the case upon the questions certified, we submit that questions FIRST, SECOND, FIFTH and SEVENTH should not be answered, and that questions THIRD, FOURTH and SIXTH are alone sufficient to control the decision of the controversy and should each be answered in the affirmative.

MAXWELL EVARTS,
HENRY W. CLARK,
Of Counsel for Appellees.

APPENDIX "A."

(14 U. S. STAT., 292.)

An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast (approved July 27, 1866).

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers,

not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for

their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workman-like manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

* * * * * *

SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

APPENDIX "B."

(16 U. S. Stat., 382).

Joint resolution concerning the Southern Pacific Railroad of California (approved, June 28, 1870).

Be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July 27, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

APPENDIX "C."

Opinion in Case of Roberts v. Southern Pacific Company.

IN THE UNITED STATES CIRCUIT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

GEORGE D. ROBERTS ET AL.,
Plaintiffs,
vs.
SOUTHERN PACIFIC COMPANY ET ALS.,
Defendants.

Stripped of the mass of irrelvant and redundant matter contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the Government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and accepting 'all mineral lands', should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land'".

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Com-

pany therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the Court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the Government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15 years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents has turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the government, charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it can not be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit

were known to be mineral lands at the time they were applied for by the railroad company under the Congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the Government, or any one in privity with the Government, could justly complain and by suit, brought within the time fixed by Congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the Government, nor any one in privity with the Government title, is here complaining. The suit is by strangers to that title, for by the express averments of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

"Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

Where did the officers of the Government, charged

with the duty of issuing patents for lands granted by Congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which Congress devolved upon the Land Department of the Government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the Joint Resolution of Congress of June 28, 1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Missouri, along a generally described route to the Colorado River, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean—granting to such company by the third section of the Act:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office."

The 18th section of the Act made a grant to the Southern Pacific Railroad Company, and is as follows:

"*And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the Act it was provided that whenever the Railroad Company—"shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three Commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said

road. And from to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing Act of Congress, the Southern Pacific Railroad Company was a corporation of the State of California, and by its charter was authorized to build a railroad—" from some point on the Bay of San Francisco, in the State of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the Eastern line of said State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

The Act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad " at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3rd day of January, 1867, filed with the Commissioner of the General Land Office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles

on each side of the road, as shown on the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the Government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following the latter order was suspended, so far as it related to lands south of San Jose, California, and November 2 and 11, 1869, the then Secretary of the Interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days' notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended. (Opinions of Attorney General, Vol. 16, pp. 80–89). July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by Congress (15 Stats. 187), and on June 28, 1870, Congress passed the Joint Resolution in question, which is here set out in full:

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior,

he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the Court to "account for, explain, construe, interpret, and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the Senate upon the resolution, where it was first introduced (Congressional Record, part V, 2nd Session, 41 Congress 1869–1870, pp. 3950, 3951, 3952, 3953).

While asking the Court to account for and explain the clause, counsel at the same time assert that the Court is not at liberty to refer to the debate in the Senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by Congress, but counsel are mistaken in supposing and asserting it to be improper for the court

to refer to the debate. In *Binns v. United States*, 194 U. S., 486, 495, the Supreme Court said:

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States v. Freight Association*, 166 U. S., 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church v. United States*, 143 U. S., 457, 464. When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"'The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committe, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.' Vol. 32, Congressional Record, Part III, page 2235."

In *Jennison v. Kirk*, 98 U. S., 453, 459, the same Court, in construing an act of Congress, and in referring to and setting forth certain statements of one of the Senators made in the Senate, said :

" These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning ; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act."

In the case of *People v. Stephens*, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the state, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See also *Wadsworth v. Boisen*, 148 Fed. 771, 778 ; *Ho Ah Kow v. Nunan*, Fed. Case No. 6546.

Turning to the debate in the Senate upon the saving clause added to the Joint Resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the General Land Office on the 3rd of January, 1867. By the Joint Resolution Congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of

the act of July 27, 1866, on each side of the line of road therein authorized ; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all *actual* settlers thereon, Congress provided in and by the Joint Resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the Joint Resolution being, as has has been seen: "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. Such are the express provisions of the grant of July 27, 1866, expressly referred to in the Joint Resolution for the conditions and restrictions of the grant of lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the Joint Resolution, in

my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the Joint Resolution of June 28, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have Congress providing for the issuance of government patents for lands under its grant which upon their face would leave open for all time, to be decided by courts or juries, as

the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the Commissioner of the General Land Office. As a matter of course, Congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by Congress and was designed, as the statute expressly declares, to convey the government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this Court said in the case of *Doe v. Waterloo Mining Co.*, 54 Fed. 935, 940:

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by

showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of *Barden v. Northern Pacific Railroad Co.*, 154 U. S., 288 [331]:

"The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action, (as held in *Deseret Salt Company v. Tarpey*, 142 U. S., 241), its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is

not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The observation that "the government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent" is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The Court could not have so decided in that case, for there was no such question before the Court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom, on the ground that when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the government patent

therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of non-mineral land only. But the court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the character of the land rested upon the officers of the Land Department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the government patent. The court said [p. 326]:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a

patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands and designate it in its conveyance.

" It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack.

" In *Smelting Co. v. Kemp*, 104 U. S., 636, 640, 641, this court thus spoke of the Land Department in the transfer of public lands : ' The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances

by this court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In *Steele v. Smelting Co.*, 106 U. S., 447, 450, the language of the court was that: 'The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In *Heath v. Wallace*, 138 U. S., 573, 585, it was held that 'the question whether or not lands returned as

'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department." And Mr. Justice LAMAR added: "It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight v. Land Association*, 142 U. S., 161, 178, as the "supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States," by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of the *Central Pacific Railroad Company v. Valentine*, 11 Land Dec., 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Depart-

ment that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment

rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the *Barden case* any support for the contention of the complainant's counsel that the officers of the Land Department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and excepting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the *Barden case* is, I think, shown by its reference thereto in the case of *Shaw v. Kellogg*, 170 U. S., 313, where, at page 339, it says:

"Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S., 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which

the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—*Shaw v. Kellogg*—is direct authority for the proposition that the officers of the Land Department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of Congress passed June 21, 1860, (12 Stats., 71) in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico, to make survey and location of the land so selected.

The grantees made their selection and applied for the land. Certain correspondence occurred between the Land Department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the Land Department instructing the surveyor general to approve the selection and make a survey thereof. The Land Department subsequently approved the survey, field notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The Act of Congress did not provide for the issuance of a patent, but the Land Department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to Congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

"These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the Government; that the Land Department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in per-

petual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the Land Department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field notes and plat thereof, the Supreme Court said :

" What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered ; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes

of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback vs. Hawks*, *supra*, 406:

"'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.'"

It results from what has been said that the demurrers must be, and are, sustained and the bills dismissed at the complainants' cost.

Ross,
Circuit Judge.

APPENDIX "D."

Opinion of Attorney General Wickersham Approving Judge Ross's Decision in this Case.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL "W. A."

153972–46 Washington, D. C.

MARCH 29, 1911.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR.

SIR:

Judge ROSS, in the United States Circuit Court for the Southern District of California, has handed down a decision in the case of *Roberts* against *Southern Pacific Company*, a copy of which I enclose for your information. This is the case concerning which there has been some correspondence between your Department and mine, arising out of the land grants to the Southern Pacific Railroad Company and the construction of the exception incorporated in the patents issued by the Interior Department prior to 1903, in the following language:

> "Yet excluding and excepting 'all mineral lands' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include, 'coal and iron land.'"

The Court in effect holds (first) that it was the duty of the Secretary of the Interior to ascertain prior to

the granting of patents whether or not the lands selected were mineral lands, and that, having reached the conclusion that they were not, that conclusion in the absence of fraud was final. This construction of the act is undoubtedly fortified by the provisions of the act of July 27, 1866 (14 Stats. 292) Section 3, which among other things, provides:

> "That all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

In other words, if the lands originally selected are found to be mineral lands, the railway company is given the right of alternative selection over other unoccupied agricultural lands. Obviously this privilege might be entirely lost if because years after a patent was issued, petroleum or some other mineral substance, should be found to exist in lands granted by patent pursuant to the original selection the grant should fail, and in the meantime all agricultural land from which selection might otherwise be made should have been taken up by other entrymen.

The Court holds that it was not competent for the Secretary of the Interior to insert the continuing "floating" exception of the character above quoted which should attach to the land if in the future it should be found that the land was mineral in character. As a matter of fact the language of the exception is ambiguous. It might possibly be construed to apply to the present or to the future; that is, the

Secretary of the Interior, without making any investigation, might have intended by this exception to reserve from the operation of the grant any lands which at that time were known or at any future time should prove to be mineral lands; or it might be that having made an investigation and being unable to find that any of the lands were mineral in character, he attempted to protect the interests of the Government against the future discovery of mineral by using this language for the purpose of excepting from the operation of the grant tracts of land in which subsequently minerals might be discovered.

The reasoning of the Court in respect to the legality of this practice seems to me to be conclusive. Congress granted in aid of the construction of the railroad certain sections of public land, not mineral, and authorized the company to select the lands under the direction of the Secretary of the Interior, and upon completion of sections of railroad for service, that patents should issue to the company, confirming to it the right and title to said lands. The purpose of this grant was to encourage and assist the railroad company to construct its lines. Obviously if the estate granted was incumbered with a "floating" indefinite species of condition subsequent, its market value would be greatly impaired.

Of course, it may be said that if the contention that all mineral lands are excluded from the operation of the grant and the patents, then mineral lands are not part of the granted estate, and the expression of an exception cannot operate to impair

it. It is not unusual for large areas of land to be granted reserving to the grantor all land of a particularly designated character within its boundaries; e. g., timber lands, saline lands, etc. In such cases it is the duty of the grantee to ascertain for himself what lands fall within the exceptions.

Upon the representation to the Interior Department that the Southern Pacific Railway Company had received patents to a considerable amount of lands which had been found to be mineral in character, and in view of the question which was mooted in this Roberts suit, your Department decided some months ago to withhold the issue of any patents to the Southern Pacific Company. It would seem to me that since this decision above referred to, there is no substantial reason why the issuance of future patents should be withheld.

The further question, however, arises upon which you asked my opinion sometime since; namely, whether or not the patents to be hereafter issued should contain an exception similar to that above quoted, which was the practice of the Department prior to 1903, or should contain no such exception. If Judge Ross' opinion is sound, as I believe it to be, it would not be proper to insert an exception in a deed; but if any exception is inserted it should be clear and not ambiguous. I am advised that the Roberts case will be appealed to the Circuit Court of Appeals and it is, of course, possible that the Court of Appeals may take a different view of the case, although I think it most improbable. But if you should deem it best to guard against any possibility of a different view being taken by the Court of

Appeals from that expressed by Judge Ross, you might during the pendency of the appeal and until the case is finally decided, issue patents containing an exception which would clearly except from the operation of the grants "all lands mineral in character now known or hereafter discovered to be such." Possibly if you tendered to the Railway Company a patent in that form they might apply to the Court to mandamus the issuance of a patent without the exception, which would bring squarely before the Supreme Court of the District of Columbia the right of the Secretary of the Interior to insert such a clause in the patent.

I make this suggestion merely out of an abundance of precaution and in order to suggest a method of affording absolute protection to you from taking any action which may fail to fully protect the interests of the United States in the premises.

Respectfully,

(Signed) GEO. W. WICKERSHAM,
Attorney-General.

Enc. 7972.

Supreme Court of the United States

OCTOBER TERM, 1912.

EDWARD KIRKE, Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, } No. 279

L. I. LANFERSIEK, T. M. AIKEN, Trustees, Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, } No. 280

APPEALS FROM THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM.

MAXWELL EVARTS,
HERBERT W. CLARK,
Counsel for Appellants.

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Thesis on Petroleum (Prof. E. T. Dumble).... I–XXVIII

Petroleum is an organic substance, a natural animal or vegetable oil, or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of distillation, rendering or refining..... I

None of the processes have any tendency toward mineralizing the oil, or of fossilizing it, or petrifying it, or in any way changing it from an organic substance to a mineral or inorganic substance..... XXII

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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE, Appellant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, Trustees, Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL MEMORANDUM.

The fifth question certified to this Court is as follows:

> "Is petroleum or mineral oil within the meaning of the term mineral as it was used in said Acts of Congress reserving mineral land from the railroad land grants?"

This question naturally separates into two—

(1) Is petroleum a mineral?

(2) If so, is it within the meaning of the word "mineral" as used in the Southern Pacific Land Grant?

I.

Is petroleum a mineral?

The opinion of all scientific men familiar with the subject is that the petroleum of the California oil fields is an organic animal substance. On the other hand, the petroleum of Pennsylvania is, in the judgment of scientists, an organic substance of vegetable origin.

Broadly speaking, these two localities cover the great oil fields of America, so that we have it clearly determined that petroleum, in the United States at least, is either of animal or vegetable origin as it may happen to come from the fields of California or the oil deposits of Pennsylvania.

A decision by this Court as to whether petroleum is a mineral or not will of course cover all the oil fields of the United States, and this Court is now asked by the lower Court, without any evidence of any kind before it, to definitely determine that petroleum which the scientists say is either an animal or vegetable substance (so far at least as the United States is concerned) is neither one nor the other, but a mineral.

It is a fact of interest that a pool of petroleum in California when exposed to the air very rapidly becomes a pool of maggots. This is well known and is stated in the Special Report on Petroleum contained in

the Tenth Census of the United States (1880), Volume X, at page 69, in the following words:

> "The exceedingly unstable character of these petroleums, considered in connection with the amount of nitrogen that they contain and the vast accumulation of animal remains in the strata from which they issue, *together with the fact that the fresh oils soon become filled with the larvæ of insects to such an extent that pools of petroleum become pools of maggots,* all lend support to the theory that the oils are of animal origin."

It is certainly extraordinary that this Court should be asked to define as mineral a substance which insects seek as a food for their young. It is difficult to believe that that is a mineral which can be and is easily devoured by maggots.

It is further true that the great mineralogists, such as Professor E. S. Dana, are very specific in their statements that petroleum is not a mineral. A full discussion of this subject will be found in what may be termed a thesis covering the question of whether petroleum is a mineral, which is attached as an appendix to this supplemental memorandum.

Of course, at some time and in some case, the question whether petroleum is a mineral will undoubtedly be presented to and decided by this Court, but the point which we desire to make clear is that in this case without any evidence whatever before the Court, it does not seem as if it should be asked to undertake to definitely decide a substance to be a mineral which scientific men

without any uncertainty whatever have unhesitatingly classed as an animal substance when found in the oil fields of California and as a vegetable substance when found in the oil fields of Pennsylvania.

As the Government has obtained leave to intervene in this case it may not be improper to state that there is now pending a case in the lower federal court between the United States and the Southern Pacific Railroad Company in which this question arises. Testimony at great length is being and will be taken on this subject. In view of this it would seem as if this Court would prefer to await further information on the subject rather than to determine without any evidence on the question at all that a substance is mineral which has been decided by scientific men to be an animal substance so far as the oil in the lands in question is concerned.

II.

Is Petroleum a mineral within the meaning of the word "mineral" as used in the Southern Pacific Land Grant?

The Court below evidently assumed that whether a given substance was a mineral within the meaning of the word as used in the land grant was a question of law and has certified this question for the decision of this Court without evidence of any kind to guide it.

It is well settled by all the late decisions in the United States and in England that the question of whether a particular thing is a mineral within the min-

eral exception in a grant or deed is not a question of law but a question of fact to be determined on evidence as to what was the common understanding of miners, land-owners and business men at the time of the grant or deed. The latest case on this question is *Symington v. Caledonian Railway Company,* Law Reports, A. C. (1912), at page 87, where it was held that,

> "whether a particular substance is or is not a 'mineral' within the meaning and for the purpose of ss. 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, is a question of fact to be determined by the evidence",

and at page 93, Earl Loreburn said:

> "It is greatly to be regretted that in cases of this kind you have to decide upon the particular facts of each case upon evidence. I do not believe myself this requirement will prove so formidable as some seem to assume; but the only alternative that I can see is to allow it to be treated as a matter of law. *Now how the question whether freestone or any other kind of stone or substance which might be found in the soil is or is not a mineral within the statute can be treated satisfactorily as a matter of law really passes my understanding.* There is no method except to ascertain these things as matter of fact according to the rules that have been laid down.
>
> *I therefore think that there ought to be proof in this case and that the judgment of the Court below ought to be reversed."*

The impossibility of defining the word mineral and the appreciation that whether a given substance is a

mineral within the meaning of a grant or deed is a question of fact to be determined by the common understanding of ordinary people at the time of the grant is again brought out by the decision of the House of Lords in *Caledonian Railway* v. *Glenboig Union Fireclay Company,* Law Reports, A. C. (1911), page 290, where it was said at page 299:

> "My Lords, the principle of the decision in this House in the *Budhill,* A. C. (1910), pp. 116, 125, and *Carpalla* cases, A. C. (1910), p. 83, seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of being itself the source of all the difficulty. It must be taken that what the railway company intended to get and the landowner intended to give was the land under the line, for the object was to give, not a wayleave, but a support. I say this speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the landowner."

In *North British Railway* v. *Budhill Coal and Sandstone Company,* A. C. (1910), page 116, the House of Lords, speaking through Lord Loreburn, laid down the rule that the determination of what was

meant by the word mineral in a statute was a question of fact, and at page 127 he said:

> "It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in s. 70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie* (13 App. Cas., 657). *The Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.*"

In the same case Lord Shaw of Dunfermline said, at page 139:

> "A true interpretation, when it takes the form of a definition, may be open to danger, but for practical purposes I respectfully agree with Lord Halsbury in his adoption of the language of James, *L. J.*, in *Hext* v. *Gill* (7 Ch., 712), that 'a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world and landowners'. The same canon of interpretation had a generation before been

adopted by Lords Meadowbank and Medwyn, although in much simpler language, in *Hamilton's case* (3 D., 1121). 'If you were to ask anyone,' said the latter judge, 'whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not.' This was decided to be the law of Scotland, and is so still. I do not think, as I have stated, that any case has been made out, apart from the authorities with which I have dealt, for a different or artificial interpretation of similar words because they occur in a statute."

In *Great Western Railway* v. *Carpalla United China Clay Company, Limited,* Law Reports, A. C. (1910), page 83, the lower Court spent eight days in taking evidence as to whether china clay was a mineral within the meaning of the Railways Clauses Consolidation Act, 1845, which excepted from lands purchased by railways "mines of coal, iron, slate or other minerals." At page 86 the House of Lords held, speaking by Lord Macnaghten as follows:

"The only question for consideration appears to be this: Is china clay a mineral?

"On this point a large body of evidence was adduced at the trial, which occupied eight days, before Eve, *J.* The learned judge reviewed the evidence with great care and came to the conclusion that china clay was not part of the ordinary composition of the soil in the district; its presence was rare and exceptional. He held on the evidence, and held, I think, rightly, that

it was a mineral, and therefore, in accordance with the provisions of the Act, excepted from the lands conveyed to the railway company.

"The learned judges of the Court of Appeal discussed the evidence at some length and came to the same conclusion.

"It would serve no useful purpose to go through the evidence again. It is enough to say that, having listened attentively to the able arguments of the learned counsel for the appellants and to such portions of the evidence as were read to the House, I am satisfied that the decision of Eve *J.*, affirmed by the Court of Appeal, is correct, and that this appeal must be dismissed with costs."

The case of *Farquharson* v. *Barnard Argue Roth Stearns Oil and Gas Co.* (22 Ont. Law Reports, 319), affirmed July 31, 1912, by the Privy Council of England (28 Times Law Reports, p. 590), is a most instructive case. The question presented was whether a deed dated June 22, 1867, which excepted and reserved to the grantor "mines and quarries of metals and minerals and all springs of oil" included petroleum and natural gas. The Court held that the question whether petroleum and natural gas were reserved by this deed, made so long ago, and one year after the grant in question to the Southern Pacific Railroad Company, was a question of fact to be determined by the evidence of ordinary men familiar with the situation at the time. The conclusion of the Court was that petroleum was reserved by reason of the reservation clause of "springs of oil", but that neither oil nor natural gas were re-

served in a deed given in 1867 by a clause reserving "mines of minerals." In other words, the Court held that upon the evidence no deed given in 1867 reserving minerals was understood by the parties that had to do with such things at the time as including petroleum. At page 335 the question was discussed as follows:

> "Granted that 'rock oil' and 'mineral gas' may be classed as minerals, are they or is either of them reserved or excepted?
>
> "While the scientific world is of disputatious mood as to the ultimate origin (*i. e.*, the genesis) of petroleum, there is a general consensus that its two valuable products, gas and oil, are compounds in different proportions of hydro-carbon—that each is a distinctive mineral of peculiar character, and, when found in sufficient bulk, may be properly spoken of as 'mines of minerals'. That is but one step in the inquiry, although it has been deemed sufficient in some reported decisions. But many of the older cases have had their foundations shaken by the deliverance of the House of Lords in a recent case, already alluded to, of *North British R. W. Co.* v. *Budhill Coal and Sandstone Co.* (1910), A. C. 116, a Scottish appeal, but which lays down principles of general application. *That case discloses an agreement among all the Law Lords that the determination of the meaning of the words 'mines and minerals' is a question of fact. That is to say, one is to find what these words mean in the ordinary sense in which they are understood and used by land-owners and those engaged in mining and commerce.* To this may be added (when the question is in

a conveyance *inter partes*), what was the understanding and intention of the parties at the time of the transaction? The outcome of the Scottish appeal is to confirm the opinion expressed as to the best method of inquiry by James, *L. J.*, in *Hext* v. *Gill* (1872), L. R., 7 Ch., 699, at p. 719, which was also advocated as the proper method by Mr. MacSwinney in his discussion of the decisions at pp. 16, 17, of his book on Mines published in 1907.

"Hence the present case will turn, not on the chemical or mineralogical signification of the terms used in the reservation, but on the meaning of them at the time, as used by ordinary persons concerned with the subject, and especially as to the meaning understood and accepted by the parties. A short reference may be made to the testimony of various witnesses called, representing farmers, business men and mining engineers, with, I think, no dissentient voice. Mr. Fleming, the treasurer of Chatham, says that, as commonly understood in that district, 'mineral' was a hard substance, and not fluid or gaseous. His memory goes back to 1865. Natural gas, he says, was discovered after the oil work had been prosecuted, and nothing was known of it in 1867 as commercially valuable. Mr. Gardner, brought up on a farm and engaged formerly in financial business (whose memory goes back to the oil excitement), says 'mineral' was something in metal form, and not oil as a general idea. Mr. Mickle, mining engineer and mining assessor for the Province of Ontario, says that 'mineral' in ordinary parlance did not include a fluid

(such as oil or gas) but was confined to minerals of metallic appearance. Mr. Drew, who had been a practical miner in oil, says that in 1867 'mineral' would not include gas or oil, but is understood to cover some hard substance. Mr. Hays, a technical chemist, says that ordinary men would not regard a fluid as a mineral, nor might he regard gas as a mineral". * * *

"The evidence in this case leads to the conclusion that neither oil nor gas in the petroleum beds was regarded as a mineral by the parties when the deed was executed in 1867."

This Canadian case, affirmed by the Privy Council, is most convincing that the question whether Congress in 1866 intended to include petroleum within the term "mineral", used in a land grant, is one of fact to be decided upon evidence.

The late decisions in the United States are in entire accord with the law as settled in England and Canada. The Pennsylvania courts have naturally had similar questions before them because of the great oil fields in that State. The latest decision of the highest court of that State is *Silver* v. *Bush* (213 Pa. St., 195), in which it appeared that a deed to certain property contained a clause "excepting the mineral underlying the same and the right of way to and from said mineral." There was no evidence that the parties intended that the word "mineral" in the deed should include natural gas. It was held that the natural gas was not re-

served to the grantor under the deed. The Court said at page 197:

> "The crucial question here, as in all contracts, is what was the sense in which the parties used the word. Mineral is not *per se* a term of art or of trade but of general language, and presumably is intended in the ordinary popular sense which it bears among English-speaking people. It may in any particular case have a different meaning, more extensive or more restricted, but such different meaning should clearly appear as intended by the parties. A very recent discussion of the subject was had in *Hendler* v. *Lehigh Valley Railroad Co.* (209 Pa., 256), where it was shown that while the word 'mineral' has a very broad meaning, already alluded to, and also a more restricted sicentific use, it has also a commercial sense, in which it is most commonly used in conveyances and leases of land, and in which it may be presumed to be used in such instruments. * * * In *Durham* v. *Kirkpatrick* (101 Pa., 36), it was expressly held that petroleum was not included in a reservation of 'all minerals,' the court saying 'in popular estimation petroleum is not regarded as a mineral substance, and can only be so classified in the most general or scientific sense. How then did the parties to the contract think and write? As scientists or as business men using the language and governed by the ideas of everday life?' It was held, therefore, that petroleum was not within the intent of the parties in reserving the minerals."

McKinney's Heirs v. *Central Kentucky Natural Gas Co.* (134 Ky., 239), was a case decided in 1909 by the Court of Appeals of Kentucky. The question there was whether deeds dated in 1871, 1874 and 1877, which conveyed to the grantee all minerals in the lands gave to the grantee "natural gas." It was conceded for the purpose of the argument that natural gas might be deemed to be a "mineral," but that the real question was whether it was a mineral such as the parties had in mind at the time of the execution of the deeds. In other words, did any of the people concerned understand that "minerals" included or was intended to include "natural gas." It was held that natural gas was not a mineral within the meaning of the word as used in the deeds in question, and at page 242 the Court said:

> "But the question to be determined is: What was the intention of the parties to the deeds at the time they were made? Did the grantors understand at that time that oil and gas were minerals and would pass with the other minerals named in the conveyances; and did they intend to convey the gas? In other words, did the minds of the parties to the conveyances meet upon the questions? Did the one understand that he was conveying, and the other that he was purchasing the gas thereunder? If not, the gas did not pass with the conveyances. The solution of this question depends upon the language used in the conveyances and the facts and circumstances surrounding the parties at the time they made them."

It is to be noted that the Kentucky Court discusses the question with reference to petroleum as well as natural gas; that is to say, the Court held that deeds given during the seventies conveying minerals to the grantee did not convey petroleum because at that time mineral was not in the language of ordinary men deemed to include any such substance as petroleum or gas.

Whatever earlier cases there may be to the contrary must be taken to "have had their foundations shaken" (*Farquharson case, supra*) by the foregoing unbroken line of decisions rendered during the last few years.

The peculiar qualities of petroleum and natural gas as differentiated from most other valuable substances under the surface of the earth are well known. Oil is like water. It is of a vagrant character. Here to-day and there to-morrow. It may be under one man's land now and under the land of another a month from now. There is no property in it until it has been reduced to possession. It is not to be compared in any way with gold or silver or any other solid substance which the ordinary man knows as a mineral. On this point this Court, speaking through Mr. Justice Shiras, said in *Brown* v. *Spilman* (155 U. S., 665, 669):

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land,

> and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property."

The great difference between petroleum and other substances beneath the surface of the earth is pointed out by Mr. Justice White in *Ohio Oil Company* v. *Indiana,* No. 1 (177 U. S., 190), where it was held that petroleum and natural gas were different from solid substances underneath the surface of the earth and therefore properly subject to the regulations of the statute of Indiana. At page 202 it was said:

> "Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs* under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-

transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners."

In *Wagner* v. *Mallory* (169 N. Y., 501), it was claimed that a lease granting the exclusive right to mine and excavate oil was an incorporeal hereditament and that petroleum was a part of the realty like coal, iron and copper. This claim was overruled and it was held that this right to mine oil was personal property and that petroleum was not part of the realty. At page 504 it was said:

"It will be observed that there is, by the terms of the lease, no grant of the oil as it exists in the earth, so that there is no passing of the title to the oil as it exists in its natural state, but that the right is limited to the mining and excavating, or the pumping and raising of the oil from the premises. It is a right to produce or extract the oil from the earth, yielding one-eighth thereof to the landlord. What was this right? Was it real estate or personal property? It is said that leases of this character are incorporeal hereditaments and that petroleum oil is a mineral and is a part of the realty like coal,

iron and copper. It is true it is a mineral substance, but it widely differs from the minerals mentioned, which are solids, having a fixed location in the earth like the rock itself. Petroleum oil is a fluid found in the porous sandrock of the earth. In some instances it, doubtless, exists in pools, but where are the pools located? They may be under the lands in which the well is drilled; they may be in the abutting or remote lands and may drain into the wells through seams or crevices in the rock, and then be extracted from the earth and reduced to possession by the operator. In this respect oil resembles water as it exists in the earth, especially salt and mineral waters, which have a market value, and is largely governed by the same rule of law. It, consequently, was held at a very early day in the history of the petroleum oil production that a man could not be restrained by his abutting neighbor from boring for oil upon his own premises, although he located his well within a few feet of the line and would necessarily drain the oil from his neighbor's land, if any existed therein. We, consequently, are of the opinion that no title to the oil vested in the lessee until it had been taken from the ground and reduced to possession."

If petroleum is not part of the realty, as the New York Court holds, it is very difficult to believe that Congress could have intended to mean by mineral something which was a fugacious thing and not real estate. No one would contend that Congress, at the time of the grant, intended to except from the grant

land containing mineral water, no matter how valuable it might be, but water is unquestionably a mineral, and some mineral waters are of great value. The reason Congress did not except such a substance was that it undoubtedly had in mind solid substances known to ordinary men as minerals, and not water or oil or gas.

As petroleum is so very different from all substances underneath the surface of the earth commonly called minerals and as the courts of last resort in this country and in England have of late years uniformly decided that whether a particular substance is a mineral under a grant or deed is not a question of law, but a question of fact to be determined on the evidence of men familiar with mining lands and business, it is not plain why the lower Court should expect this Court to pass upon this question without one word of evidence to assist it to a conclusion.

This Court has never yet undertaken to determine what was meant by the word "mineral" in the railroad land grants. Further than that it has recognized the impossibility of making such a definition and has practically stated, in accord with the decisions of the House of Lords above referred to, that it has not sufficient knowledge to attempt to make any definition of the word. In so stating, this Court means and intended to mean that such a question when it arose would depend upon the evidence in each particular case. There seems to be no other conclusion than this to be drawn from the words of this Court in *Northern Pacific Railway* v. *Soderberg* (188 U. S., 526), where it was held that lands containing granite were mineral lands. In

that case Mr. Justice Brown wrote the opinion of the Court saying substantially at page 533 that Congress in 1864 did not have a definite idea of what was meant by the word "mineral." His words were:

> "Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word 'mineral' it is clear that in 1884 when the line of this road was definitely located it had come to be understood as including all lands containing 'valuable mineral deposits' as well as lands 'chiefly valuable for stone'."

Again, at page 536, Mr. Justice Brown says:

> "We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the act of July 2, 1864. *With our present light on the subject it might be difficult to do so.*"

The words quoted from the opinion of Mr. Justice Brown in the *Soderberg case, supra,* can only mean that what Congress intended by mineral lands at the time of the granting act (1864 in the *Soderberg case;* 1866 in the present case) was not clear, and that before attempting to decide the question the Court would require to be enlightened on the subject. The only way this Court could get further light on the subject would be by evidence. The ground of the decision in the *Soderberg case* was that at the time of fixing the grant by the filing of the map of definite location in 1884 Congress had clearly indicated by acts subsequent to the granting act what it meant with reference to the particular sub-

stance under consideration in the *Soderberg case, i. e.,* granite. There was no act of Congress between the date of the grant in the present case (1866) and the date of filing the map of definite location (1867) which threw any light on the subject.

On the contrary, the acts of Congress subsequent to the granting act of 1866, clearly indicate that Congress never for a moment supposed in 1866 that petroleum was a mineral in the ordinary acceptation of the meaning of that word. This is clearly indicated by 29 U. S. Stats., 526, approved February 11, 1897, which provided that petroleum lands could be entered and patented under the placer mining laws. This statute is as follows:

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof."

Unquestionably this law was passed by Congress because of the decision of the Secretary of the Interior of August 27, 1896, In re *Union Oil Company* (23 L. D., 222), where it was held that land containing

petroleum did not fall within the contemplation of the mineral laws and could not be located and entered as a placer mine. In the course of his opinion the Secretary of the Interior said at page 227:

> "In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded."

It is true that this decision of the Secretary of the Interior was afterwards overruled by a decision of the Acting Secretary in re *Union Oil Company* (25 L. D., 351), but it was not overruled until after the passage of the act above referred to. The date of the act was February 11, 1897. The date of the overruling opinion was November 6, 1897.

The only conclusion to be drawn from the decision of the Secretary of the Interior in 1896 and the Act of 1897 is that prior to the time of the latter's passage, petroleum was not considered a mineral within the mining laws of the United States. If not a mineral in 1897 within the mining laws, how can it be contended to have been deemed a mineral more than thirty years before under a land grant?

We therefore find this Court to be in accord with the House of Lords and with the highest State courts in this country upon the proposition that whether

a certain thing is a mineral within the meaning of the land grant is a question of fact to be determined upon the evidence of men of business familiar with mining and with land at the time of the grant in question, namely, in 1866.

Another consideration which possibly may be of interest is that in the granting act, coal and iron were not excepted. The reason was that Congress desired the railroad to have its fuel and its material for its roadbed and equipment from the granted land if they should happen to be found therein. If petroleum had been a substance well known at the time and if its location in California at the time of the grant had been a matter of common knowledge, it would seem as if Congress in its grant would have included petroleum with coal and for the same reasons, viz.: in order that it might be used as fuel in its locomotives. Certainly this would have been done, if the entire absence of good coal from that part of the country had been then known.

At the present time there are pending in the federal courts of the district of California suits between the Government and the Southern Pacific Railroad Company in which this question is raised. Testimony is now being taken or is about to be taken by the lower Court upon this question, and those cases when they reach this Court will contain full evidence upon the subject, so that this Court will be enabled to pass upon this question in the light of all the evidence that can be presented.

Of course, any decision by this Court as to whether

petroleum is a mineral within the meaning of the word as used in the Southern Pacific land grant would not be limited in its force and effect to this particular case, but would furnish a definition that would affect all the grants of all the land grant railroads in the United States. It is a question of gravity and vast importance in its extent and far-reaching effect. It is a question of great interest as a legal proposition.

Under the circumstances therefore we respectfully submit that this fifth question should not be answered by the Court upon the ground that it is not a question of law, but a question of fact, and that in the absence of a statement of any facts in the certificate the Court will decline to answer the question and will await a case in which light can be thrown upon the entire subject by evidence introduced upon the trial of the case in the Court below, as is shown by the foregoing authorities to be the proper course.

III.

Facts necessary to an intelligent answer to some of the questions other than the fifth question certified are omitted from the certificate.

One of the basic propositions of appellants is that somehow and in some way the original alleged mining locations made prior to the patent withdrew the land covered thereby from the grant as fixed by the filing of the map of definite location in 1867. Apparently the idea in the mind of appellants is founded on the decision in *Northern Pacific Railroad Co.* v. *Sanders*

(166 U. S., 620). The *Sanders case* simply decided that a mining location which had been filed in the proper land office of the United States, if pending at the time the map of definite location was filed, was such a claim as to take out of the grant the lands covered thereby. In order to come within the ruling of the *Sanders case* it is argued by the appellants that as the land in question was withdrawn from the grant by reason of the prior location, therefore the land did not pass by the patent of 1894 and was open to location in 1909.

In order to make such an argument as this it is necessary that there should appear in the certificate certain facts as to the original location. These necessary facts are as follows:

(1) The date of the filing of the map of definite location; and

(2) The date of filing the mineral application in the United States Land Office by the locators.

The certificate is silent upon both propositions. It appears nowhere in the certificate whether the locations alleged to be prior to the patent were made in the United States Land Office or in some local State office. The time of the inception of these locations is not given. It is merely stated in the certificate that prior to 1892 which was the date of the making of the application for the listing of the lands by the railroad company the locations were made. It is, however, a long period of time between 1892, the only date given in the certificate, and 1867, the date of filing the map of definite location. We therefore have this situation: This Court is asked

to make a ruling in accordance with the *Sanders case, supra,* but without any evidence whatever as to the facts necessary to make such a ruling.

The certificate is also curiously defective in that it states that the original locators did not perform the requisite annual labor in the year 1908. It does not state that that was the first time that the locators failed to perform their annual labor. For all that appears in the certificate the original locators had never performed their annual labor, and the alleged locations for all that appears (and it probably was the fact) were abandoned immediately after their filing in some local State office and without the performance of any annual labor whatever.

The mining locations referred to in the certificate which are said to have existed prior to the patent to the railroad company are remarkable for four things:

(1) Nobody knows the name of the locator; at least the certificate does not give it.

(2) Nobody knows the date of the filing of the locations; at least the certificate does not give it.

(3) Nobody knows the place of the filing of these locations; at least the certificate does not give it.

(4) Nobody knows whether any annual labor was ever performed at any time with reference to these mining locations; at least the certificate does not state that any annual labor was ever performed.

The complaint of appellants is not that the Secretary of the Interior during the two years between the

application and issuance of the patent did not examine into the question, but that he did not have a hearing of which these supposed locators were given notice. How could the Secretary of the Interior have a hearing to which these locators were summoned to appear when nobody knew their names and nobody knew when or where their claims were filed? What occasion was there for a hearing by the Secretary of the Interior when no mining claim of any kind had been filed in the United States Land Office? The Secretary of the Interior had received the report of the Surveyor-General that the lands were not mineral, and nobody had even suspected the presence of mineral in these lands sufficiently to cause them to file any claim in the United States Land Office (Burke's Brief, p. 455). It appears by the certificate of the Court below simply "that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land and no *hearing* was had in the Land Office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same and that the patent so issued to the railroad company was issued without any *such investigation or determination*" (p. 2). We do not understand that this certificate means or is intended to mean that the Secretary of the Interior did not fully examine into this matter during the two years in which it was before him. It simply means that a hearing was not given to these mining locators whose names were unknown and whose claims were never filed in any United States Land Office.

In other words, the Court below was evidently unable to make in its certificate these important statements of fact. Undoubtedly the reason was that these original locations, if they ever existed at all, were some general blanket filings in a local State office made by somebody at a time when no doubt mineral locations were filed on any land wherever it might be situated in the State of California. Not locations filed in a United States Land Office because of the knowledge of minerals in the soil, but locations filed in some local State office on a chance and never followed up because there was no real reason to suppose the land contained any mineral deposit.

In the absence of such facts from the certificate it would seem that the practice of this Court is to decline to proceed and to dismiss the certificate. *United States* v. *Union Pacific R. Co.* (168 U. S., 505).

MAXWELL EVARTS,
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Of Counsel for Appellees.

APPENDIX.

Petroleum Not a Mineral.

THESIS.

(1) Petroleum is an organic substance, a natural animal or vegetable oil, or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of distillation, rendering or refining.

(2) None of the processes have any tendency toward mineralizing the oil, or of fossilizing it, or petrifying it, or in any way of changing it from an organic substance to a mineral or inorganic substance.

(3) Petroleum is not a mineral.

1. PETROLEUM IS AN ORGANIC SUBSTANCE, A NATURAL ANIMAL OR VEGETABLE OIL, OR A MIXTURE OF SUCH OILS. IT IS DERIVED FROM THE REMAINS OF PLANT AND ANIMAL LIFE, THROUGH THE ACTION OF BACTERIA, BY NATURAL PROCESSES OF PARTIAL DECOMPOSITION AND OF DISTILLATION, RENDERING OR REFINING.

ORGANIC:

> Pertaining to objects that have organs; hence, pertaining to the animal and vegetable worlds; resulting from or exhibiting characteristics peculiar to animal or vegetable life and structure; organized.
>
> The term organic as applied to any substance in no way relates to presence or absence of life. The materials which compose the living body are, of course, organic in the main, but they are equally so after death has occurred—at any rate for a certain time—and some of them continue to be so for an

indefinite period after life has departed. Sugar, for example, is an organic product; but, in itself, it is of course dead after the organism which produced it has lost all vitality.

H. A. NICHOLSON.

(Century).

ORGANIC SUBSTANCES:

Substances which proceed from or constitute organic bodies.

(Webster).

ORGANIC BODIES:

Such as possess organs on the action of which depend their growth and perfection as animals and plants.

(Webster).

PETROLEUM:

Rock oil; a liquid, inflammable, bituminous substance exuding from the earth and collected on the surface of the water in wells and fountains in various parts of the world, or oozing from cavities in rocks. It is essentially composed of carbon and hydrogen.

(Webster).

An oily substance of great economic importance, especially as a source of light, occurring naturally, oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into rock; rock oil.

(Century).

Petroleum is one of the forms of Bitumen (Peckham, Rept. Tenth Census, p. 3).

Natural gas and petroleum are embraced among the products of the crust of the earth known as bitumens; other bodies in the same list are the semi-fluid maltha and the solid asphaltum (Orton, Eighth Ann. Rept. U. S. G. S., p. 485).

The bituminous substances occurring in Nature may be either gaseous, fluid, or solid. They are

composed principally of carbon and hydrogen and only occasionally do oxygen or sulphur enter into their composition in any considerable amount.

All bitumens arise from the same formational processes; the heavier—the later named members of the following series: Gases, Fluids (Petroleum), Solids (Asphalts, etc.),—are formed from the lighter for the most part through partial evaporation, but also in part through chemical change.

The fluid and solid Bitumens differ from other organic rocks, such as mineral coal, through their solubility in turpentine, benzine, ether, chloroform, bisulphide or carbon, etc. Hoefer, Das Erdoel (p. 1).

The literature of petroleum and allied bitumens is very extensive, 6,000 titles being catalogued by Redwood in his work on Petroleum.

The observations, experiments and theories recorded in these various publications have been carefully and critically examined by several of the later authorities on the subject, and the more important facts and theories quoted with proper reference to the original paper. The existence of such summaries and the critical remarks of these later writers in connection with them give the best index of what is really known on the subject. Furthermore, these are easily accessible, while the greater part of the original papers are not. For this reason the greater number of quotations given herein are from such summaries, for convenience of reference and verification.

Among these are:

PECKHAM, S. F.:

Report on the Production, Technology and Uses of Petroleum and its Products (Report Tenth Census U. S., Vol. 10. Washington, 1884).

In Part I, Natural History of Petroleum, etc., Mr. Peckham outlines the history of the discovery and development of Petroleum, its geographical distribution, its geological occurrence, its chemistry and its origin (pp. 1 to 75).

ORTON, EDWARD:

The Trenton Limestone as a source of Petroleum and Inflammable Gas in Ohio and Indiana (Eighth Annual Report of the U. S. Geological Survey, Part II, Washington, 1889).

Chapter I, Prof. Orton summarizes the various theories of the origin of Petroleum and Natural Gas and discusses them at length.

With slight alterations and additions, Prof. Orton has repeated these views in:

First Annual Report of the Geological Survey of Ohio—Columbus, 1890, and

Report on the Occurrence of Petroleum, Natural Gas and Asphalt Rock in Western Kentucky. Geological Survey of Kentucy, Frankfort, 1891.

REDWOOD, BOVERTON:

Petroleum, 2 Vols. London and Philadelphia, 1896.

Vol I relates the History and describes the Geological Distribution of Petroleum and Natural Gas, their Chemical and Physical Properties and their Origin.

In the new edition of this work (1906) these subjects are extended to include the results of later investigations, and a bibliography of 6,000 titles on the general subject is given.

HOEFER, H.:

Das Erdoel, Braunschweig, 1906.

Chapter VI, Origin—Gives résumé of the observations, experiments and theories of the numerous investigators of this subject, with reference to their publications.

CLARKE, F. W.:

The Data of Geo-Chemistry, 2nd Edition, Bulletin 491, United States Geological Survey, Washington, 1911.

"A Critical Summary of what is now known and a Guide to the more important literature on the subject."

Chapter XVI, The Natural Hydrocarbons, Composition, Synthesis and Origin of Natural Gas, Petroleum, Bitumen and Asphalt.

THEORIES OF ORIGIN:

> Generally speaking, they fall into three different categories, embracing those who regard bitumen as a distillate produced by natural causes, those who regard bitumen as indigenous to the rocks in which it is found, and those who regard bitumen as a product of chemical action (Peckham, p. 59).

This is somewhat differently stated by Orton:

> The theories as to the origin of petroleum and natural gas, including the derivations of Petroleum, asphaltum and maltha can be divided into two main groups, viz.: (1) Those which refer these bodies to inorganic sources, or, in other words, which make them the result of chemical affinity, acting on mineral matter, and (2) those that regard them as the result of a partial decomposition of vegetable or animal substances that have been stored up in the rocks (pp. 485-6)

and still more concisely by Clarke:

> The theories so far advanced may be divided into two categories—the inorganic and the organic (p. 693).

INORGANIC ORIGIN:

The various chemical theories of the origin of Petroleum, beginning with that of Berthelot in 1866, are reviewed by Mr. Peckham, who states:

> These chemical theories are supported by great names, and are based on the most complete and elaborate researches; but they require the assumption of operations nowhere witnessed in nature or known to technology (p. 61).

Prof. Orton also reviews these theories briefly and endorses Mr. Peckham's conclusion as follows:

> In fact that all these theories "require the assumption of operations nowhere witnessed in na-

ture or known to technology" we find enough to condemn them, or, at least, enough to forbid any large measure of confidence in them (p. 487).

Prof. Hoefer, after an extended review of the claims for inorganic origin of petroleum, concludes:

> From geological points of view, every hypothesis which attributes the origin of oil to inorganic sources is shut out (p. 173).

Prof. Clarke, however, after a full review of the theories, says:

> In conclusion, I may be allowed to suggest that nearly all of the proposed theories to account for the origin of petroleum embody some elements of truth. Sokoloff's cosmic hypothesis is sustained by the fact that hydrocarbons are found in meteorites. The volcanic hypothesis is sustained by the fact that hydrocarbons occur among volcanic emanations. The organic origin of petroleum, however, seems supported by the geological relations of the hydrocarbons which are found in large quantities only in rocks of sedimentary character. There is no evidence to show that any important oil field derived its hydrocarbons from inorganic sources (p. 704).

ORGANIC ORIGIN:

The economic history of petroleum begins with the completion of the Drake well in 1859; but the way had been well paved for its reception during the two decades just preceding that event, through the manufacture in France, England and America of shale oil, parrafin and kerosene by the distillation of cannel, Boghead and Albert coal and bituminous shale, and

> The relation between petroleum and the oils obtained by distillation from peat, lignite, and coal, led at an early date to a belief that petroleum was produced from one or all of these materials (Redwood, p. 236).

Formation from Coal.

In the definition of bitumen, Webster states:

> The liquid kinds come out from bituminous rocks or from clay beds containing coal or lignite.

Von Kobell and others considered anthracite to be the residue from the formation of petroleum from coal and Hoefer has numerous references of those who claim a similar derivation of petroleum.

Geike, describing the effects of eruptive rocks upon carbonaceous beds and particularly upon coal seams, says:

> During the subterranean distillation arising from the destruction or alteration of coal and bituminous shales, while the gases evolved, find their way to the surface, the liquid products on the other hand are apt to collect in fissures and cavities. In central Scotland, where the coal fields have been so abundantly pierced by igneous masses, petroleum and asphalt are of frequent occurrence, sometimes in chinks and veins in sandstone and other sedimentary strata, sometimes in the cavities of the igneous rocks themselves. In West Lothian intrusive sheets traversing a group of strata containing seams of coal and oil shale, have a distinctly bituminous odor when freshly broken, and little globules of petroleum may be detected in their cavities. In the same district the joints and fissures of a massive sandstone are filled with solid brown asphalt, which the quarry men manufacture into candles (Text Book of Geology, p. 561).

Even as late as 1891, Mr. Watson Smith argues in favor of such a derivation of petroleum in connection with some experiments on Japanese coal.

While there can be no doubt that petroleum may be and sometimes is produced in this manner we have no positive proof that it has ever been the means of producing quantities of any considerable economic importance.

The coal and oil fields are usually entirely distinct and the greatest oil fields of the world are far removed from any formations containing coal, as in Russia, Pennsylvania, Texas, California, and Mexico.

The evidence points to a derivation from materials similar to those from which coal was produced.

> The most probable view seems to be that both coal and petroleum are formed from organic mat-

> ter, but of different kinds and under slightly different conditions—that coal is formed *from terrestrial* vascular plants, in the presence of *fresh water,* while bitumen and petroleum are formed from more *perishable cellular* plants and animals, in the presence of *salt water* (Le Conte, Elements of Geology, p. 389).

Among the early statements of the organic origin of petroleum is that of Reichenbach in 1834:

> When we remember that coal is so filled with the remains of plants that its origin has been attributed entirely to the destroyed vegetables of an early period, it must appear probable that petroleum was formed from such plants as afford these oils, and, in a word, that our mineral oil is nothing but turpentine oil of the pines of former ages; not only the wood, but also the needle-like leaves, may have contributed to this process, which is not a combustion, but is, I believe, simply the result of the action of subterranean heat (Peckham, p. 65).

While by far the greater number of authorities agree upon the organic origin of petroleum, they differ among themselves as to whether it be from plants or animals and as to the place and manner of its formation. Some believe it to have been formed in the rocks which now enclose it, others hold that subsequent to its formation it was transported to its present location.

The theory that it is organic in origin and indigenous to the rocks in which it is found was held by Hunt and Lesley for Canada and the Pennsylvania region; by Wall for Trinidad and Whitney for California. These authorities are quoted at some length by Peckham and Orton:

> The facts observed in this locality appear to show that the petroleum, or the substance which has given rise to it, was deposited in the beds in which it is now found at the formation of the rock. We may suppose in these oil-bearing beds an accumulation of organic matters, whose decomposition in the midst of a marine calcareous

deposit has resulted in their complete transformation into petroleum, which has found a lodgement in the cavities of the shells and corals immediately near. Its absence from the unfilled cells of corals in the adjacent and interstratified beds forbids the idea of the introduction of the oil into these strata either by distillation or by infiltration.

In the township of Packenham, the large orthoceratites of the Trenton limestone sometimes hold several ounces of petroleum in their chambers, and it has been met with under similar conditions in Lancaster. It has also been observed to exude from the fossil corals of the Birdseye limestone at Montmorency (R. S. Hunt, 1863. Peckham, p. 62).

When in situ, it (the asphalt) is confined to particular strata, which were originally shales containing a certain proportion of vegetable debris. The organic matter has undergone a special mineralization, producing bituminous in place of ordinary anthraciferous substances. This operation is not attributable to heat, nor of the nature of distillation, but is due to chemical reaction at the ordinary temperature and under the normal conditions of the climate. The proofs that this is the true mode of generation of the asphalt, repose not only on the partial manner in which it is distributed in the strata, but also on numerous specimens of the vegetable matter in process of transformation and with the organic structure more or less obliterated. After the removal by solution of the bituminous material, under the microscope, a remarkable alteration and corrosion of vegetable cells becomes apparent, which is not presented in any other form of the mineralization of wood. * * *

Sometimes the emission is in the form of a dense, oily liquid, from which the volatile elements gradually evaporate, leaving a solid residue (Wall, Orton, p. 500).

In conclusion, it may be remarked that the marine infusorial rocks of the Pacific Coast, and especially of California, are of great extent and importance. They occur in the Coast Ranges from Clear Lake to Los Angeles. They are of no little

economical as well as scientific interest, since, as I conceive, the existence of bituminous materials in this state, in all their forms, from the most liquid to the most dense, is due to the presence of infusoria (Whitney, Peckham, p. 65).

In the case of the oil-bearing shales of California, the Petroleum is evidently derived from the animal remains with which the formation was originally filled. In composition, this oil agrees with the limestone oils already described.

Peckham speaks of this class of petroleum as formed of animal matter that has not been subjected to destructive distillation (Orton, p. 495).

PECKHAM'S conclusion:

> I am convinced that all bitumens have, in their present condition, originally been derived from animal or vegetable remains, but that the manner of their derivation has not been uniform. I should, therefore, exclude both classes of chemical theories; the first as impossible, the second as unnecessary. Then remains the hypothesis that bitumen is indigenous to the rocks in which it is found and that which regards all bitumens as distillates. * * *

In his discussion of this, he states as his conclusion regarding the derivation of California oils:

> The exceedingly unstable character of these petroleums, considered in connection with the amount of nitrogen that they contain, and the vast accumulation of animal remains in the strata from which they issue, together with the fact that the fresh oils soon become filled with the larvæ of insects to such an extent that pools of petroleum become pools of maggots, all lend support to the theory that the oils are of animal origin (pp. 67-69).

The theory that it was formed at one place and afterward transported to its present location is thus stated:

> The second view is that petroleum is derived from the secondary decomposition of organic matter, stored in the rocks. It assumes that the orig-

inal vegetable and animal matter has suffered a partial transformation and is now held in the rocks as hydrocarbon compounds, from which, by a process of distillation, oil and gas are derived. * * * (Orton, p. 488).

Newberry and Peckham have been the strongest advocates of this theory in the United States, and their views are fully given by Peckham, Orton and Redwood:

> I have already referred to the Huron shale as a probable source of the greater part of the petroleum obtained in this country. * * * The considerations which have led me to adopt this view are briefly these:
>
> First.—We have in the Huron shale a vast repository of solid hydrocarbonaceous matter which may be made to yield from ten to twenty gallons of oil to the ton by artificial distillation. Like all other organic matter, this is constantly undergoing spontaneous distillation, except where hermetically sealed deep under rock and water. This results in the formation of oil and gas, closely resembling those which we make artificially from the same substance; the manufactured differing from the natural products only because we cannot imitate accurately the processes of nature.
>
> Second.—A line of oil and gas springs marks the outcrop of the Huron shale from New York to Tennessee. The rock itself is frequently found saturated with petroleum, and the overlying strata, if porous, are sure to be more or less impregnated with it. * * * Again, the emanations of oil and gas from the Lower Silurian rocks at Collingwood, Canada, and on the upper Cumberland River, Kentucky, are associated with similar deposits of black shale which represent the Utica slate of New York.
>
> Third.—The wells on Oil Creek penetrates the strata immediately overlying the Huron shale and the oil is obtained from the fissured and porous sheets of sandstone of the Portage and Chemung groups, which lie just above the Huron and offer convenient reservoirs for the oil it furnishes (Newberry, Orton, p. 492).
>
> These oils are undoubtedly distillates, and of vegetable origin. The proof of this statement

seems overwhelming. Pennsylvania petroleum was examined in 1865 by Warren and Storer in this country, and in 1863 by Pelouze and Cahours in France, who found the lighter portion to consist of a certain series of hydrocarbons, identical with those obtained in the destructive distillation of coal, bituminous shales, and wood when the operation was conducted at low temperatures (Peckham, Orton, p. 492).

Bitumens are not the product of the high temperature and violent action of volcanoes, but of the slow and gentle changes at low temperature due to metamorphic action upon strata buried at immense depths. * * *

It is not necessary here to discuss the nature or origin of metamorphic action. It is sufficient for our purpose to know that from the Upper Silurian to the close of the Carboniferous periods the currents of the primeval ocean were transporting sediments from northeast to southwest, sorting them into gravel, sand, and clay, forming gravel bars and great sand-beds beneath the riffles and clay banks in still water, burying vast accumulations of sea weeds and sea animals far beneath the surface. The alteration, due to the combined action of heat, steam, and pressure, that involved the formations of the Appalachian system from Point Gaspe, in Canada, to Lookout Mountain in Tennessee, in involving the Carboniferous and earlier strata, distorting and folding them, and converting the coal into anthracite and the clays into crystalline schists along their eastern border, could not have ceased to act westward along an arbitrary line, but must have gradually died out farther and farther from the surface.

The great beds of shale and limestone containing fucoids, animal remains, and even indigenous petroleum, must have been invaded by this heat action to a greater or a less degree.

Too little is known about petroleum at this time to enable anyone to explain all the phenomena attending the occurrence of petroleum on any hypothesis; but it seems to me that the different varieties of petroleum * * * are the products of fractional distillation, and one of the strongest proofs of this hypothesis is found in the

large content of paraffin in the Bradford oil under the enormous pressure to which it is subjected.

If this hypothesis * * * really represents the operation of nature, then we must seek the evidence of heat action at a depth far below the unaltered rocks in which the petroleum is now stored (Peckham, Orton, p. 492).

Prof. Orton holds with Hunt, that petroleum is a result of primary decomposition of animal and vegetable tissue and not a secondary one as held by Peckham, and bases his opinion on the fact that Hunt's theory seems to find more support in the processes of nature at the present time.

We find the bitumen series in actual process of formation * * * resulting apparently from the primary decomposition of organic matter under normal conditions, and we do not find them resulting from secondary decomposition under similar conditions (Orton, p. 504).

Dr. Orton thus expresses himself:

Petroleum is undoubtedly indigenous to, and derived from, certain limestones, as Hunt has so strongly asserted. The Trenton limestone is undoubtedly the most important source of oil and gas in the Geological scale of the United States at the present time. On the other hand, Newberry's doctrines, that the great supplies of the Pennsylvania field are derived from Devonian shales, is becoming more firmly established and more generally accepted every year, though it seems likely that he has laid too much stress on *bituminous* shales. In other words, the theories are not exclusive of each other. Different fields have different sources. We can accept, without inconsistency, the adventitious origin of the oil in Pennsylvania sandstones, and its indigenous origin in the shales of California, or in the limestone of Canada, Kentucky, or Ohio.

The double origin of petroleum, from both limestones and shales—and it is not necessary to exclude sandstones from the list of possible sources—deserves to be universally accepted. In confirmation of this double origin, it is coming to be recog-

nized that the oil and gas derived from these two sources generally differ from each other in noticeable respects. The oil and gas derived from limestones contain a larger proportion of sulphur than is found in the oil and gas of the shales. Sulphur compounds impart to the oil a rank and persistent odor, from which they can be freed only with great difficulty. In the case of the oil-bearing shales of California, the petroleum is apparently derived from the animal remains with which the formation was originally filled. In composition, this oil agrees with the limestone oils already described. * * * Certain it is that the "limestone oils" differ in physical characteristics from the Pennsylvania oils, for example, in a marked degree. They are dark in color; they are heavy oils, their gravity ranging generally from 34 deg. to 36 deg. B,. though sometimes rising to 40 deg. or even 42 deg. They have a rank odor, arising from the sulphurous compounds which they contain. The oils of Canada, Kentucky, and Tennessee, and of the new field in northwestern Ohio, all agree in these respects, and the oil and gas of the Utica shale and the Hudson River group of the slate fall into the same category (p. 494).

Under the head of Vegetable and Animal Origin, Redwood covers practically the same ground, but gives a larger number of references to European authorities, and concludes:

> From the account given in this section, it will be seen that there has been abundance of speculation as to the origin of bitumen, and that, in regard to some of the theories, a considerable amount of experimental proof has been forthcoming. Probably, on the whole, the Hoefer-Engler views at present have the largest number of adherents, and in respect, at any rate, to certain descriptions of petroleum, are the most worthy of acceptance. At the same time, a careful study of the subject leads to the conclusion that some petroleum is of *vegetable* origin, and it therefore follows that no single theory is applicable in all cases (p. 240).

Hoefer, in his chapter on the origin of petroleum, gives the results of the work of a great number of geologists and chemists, both American and European, who have, by investigation and experiment, contributed to our knowledge of the subject. While Engler was probably the first one to come out strongly for the animal origin of petroleum, Hoefer has done much to give this theory full recognition, and his references on this particular view of its origin are very full and convincing. While he holds that by far the greater proportion of petroleum is of animal origin, in view of later discoveries and experiments, he concedes that he can see no real difference between the animal fats, from which it is supposed to be derived, and those of oil or wax-bearing plants.

The formation of adipocere from animal remains by the work of bacteria is fully discussed by Hoefer. The final production of oil from adipocere and sapropel, he attributes not to pressure distillation, but to a "garungsprozess," that is, a process of fermentation (Erdoel, p. 208).

Engle's own conclusions are, as follows:

> Petroleum, in the main, is produced from the fatty materials (solid and liquid fats, adipocere and waxes) of submerged animal and plant remains, after remaining organic elements have been disintegrated through putrefaction and rotting. The albumens, through separation of sebaceous material, may indirectly take part in such production, but only in small measure.
>
> The transformation of the fatty materials into petroleum has been accomplished under very diverse conditions of pressure, of temperature, and in cycles of time of different duration.
>
> The differences in petroleum are, primarily, caused through the differences in conditions of formation (pressure, temperature, time), and secondarily through the nature of fatty materials of varied derivation (Inter. Pet. Cong. Bucarest, Vol. 2, p. 35).

David White, Paleobotanist of the United States Geological Survey, in "Some Problems in the Formation of Coal":

> It was, perhaps, the most important of the brilliant achievements of the lamented Renault to show conclusively that in times past, just as at present, the fermentation and decomposition of organic tissue, whether vegetable or animal, was chiefly accomplished through the vital activity of microorganisms, by far the most important of which were the anaerobic bacteria. Evidence of the work of bacteria in the decomposition of vegetable tissues, now found fossil, has been observed in so many cases, covering so many plant types, and dating from so many periods of geological time as no longer to leave open to question its preeminence as a factor in coal formation.
>
> Renault has clearly shown that in the swamp, lagoon, or peat bog, the plant tissues are attacked by insects, worms, amoeboids, fungi, and bacteria, of which the last named are preeminently most effective, absolutely omnipresent, and always most persistent. The two first mentioned are chiefly instrumental in the mechanical dissociation of the tissues, while at the same time aiding the bacteria in penetrating to the different portions of the vegetable structure. In this work the fungi also were doubtless of especial assistance.
>
> If uninterrupted, the process goes on until all of the softer tissues are disintegrated and decomposed, leaving only the most enduring and indestructible parts, such as the densest cells, fragments of cuticle and seeds, or spore envelopes immersed in a dark, subgelatinous plastic or liquid mass, the "fundamental matter" or "fundamental jelly."
>
> Following the lines suggested by von Gumbel, they demonstrated that the bogheads, including the Torbanite and Australian Kerosene shales, are preponderantly composed of the residues, generally remarkably well preserved, of the thalli of various gelosic (gelatinous) micro-algae. In some cases these comprise nearly the entire rock mass, counting over 250,000 per cubic centimeter. Similar micro-algae are present in many of the richer bi-

tuminous shales, especially those exploited for illuminating gas. Evidence of the presence of zoological elements, including microscopical types, is usually observed, particularly in the deposits of Cretaceous or Tertiary age.

Observing that the algae coals studied by Renault and Bertrand yielded petrolic oils as well as highly illuminative gases on distillation, their richness seeming to depend on the algal proportion, the writer was prompted to examine several well- recognized oil rocks with a view to detecting the presence of analogous algae as constituting a probable original source of the volatile hydrocarbons. Micro-algae were found to form a considerable part of the oil shale reported to have come from the Permian of Brazil and the Eocene of Arkansas. Portions of the "oil rock" at Plattville, Wis., were found to consist mostly of what appear to be flattened, gelatinous, unicellular algae, probably allied to the Protococcales. The composition of this oil rock from the Trenton offered, in the writer's judgment, a satisfactory explanation of the genesis of the petroleum and gas in our Paleozoic formations. While the Diatomaceae may, in some instances, have been the source of the Tertiary and some Cretaceous oils and gases, the conclusion that those in the older sedimentary rocks are probably derived by pressure-distillation from gelatinous micro-alge appears, to the writer, to be well founded.

The question of the part played by algae in the genesis of petroleum was meanwhile being considered independently by Potonie, whose conclusions, appearing almost simultaneously are substantially the same. This able German paleobotanist, who now has devoted much research and discussion to the subject, applies the term "Sapropel" to the accumulating residium of the gelatinous or fatty algae mingled with more or less animal matter partialy decomposed or putrified in stagnant or quiet water.

Sapropel he calls the "mother rock" of petroleum (Economic Geology, 1908).

The most recent and in many ways the best review of this subject is that of Clarke, from which the following statements are taken:

> From data of this kind, and from the experiments cited in the preceding section of this chapter, it is evident that hydrocarbons analogous to natural gas, petroleum, and asphalt, may be derived either from animal or vegetable matter, or from both. This, I think, admits of no dispute, but argument is possible relative to the genesis of the larger accumulations of mineral oil.
>
> The nitrogen bases of California petroleum furnish perhaps the strongest evidence that the proteids contribute their share to the make-up of petroleum, and show also that these particular oils are of animal origin.
>
> Several other writers have brought evidence to bear in favor of the derivation of petroleum from fish remains. Dieulafait observed that the copper shales of Mansfeld are strongly impregnated with bitumen, and also rich in fossil fish. The petroleum of Galicia is always associated with menilitic schists in which fish remains are peculiarly abundant.
>
> Bertels, on the other hand, attributes the Caucasian petroleums to the decomposition of mollusks. In the Kuban district, the oil, accompanied by salt water, exudes directly from beds of molluscan remains, which occur in enormous quantities.
>
> E. Sickenberger has shown that in small bays of the Red Sea, where the salinity reaches 7.3 per cent. petroleum is actually forming as a scum upon the surface of the water. Living forms are abundant in these bays, and their remains, after death, furnish the hydrocarbons. The latter are to some extent absorbed into the pores of coral reefs, and so contribute to the formation of bituminous limestones. A still earlier publication by O. F. Fraas contains data of similar purport. Fraas found in Egypt shells filled with bitumen and noticed that the bituminous beds were rich in fossils, while the non-bituminous strata were poor. In the region of the Dead Sea, also, Fraas noticed that bitumen was abundant in beds of baculites, from which it

exudes to accumulate upon the shore. In this connection, it may well be noted that the brines which are so often associated with petroleum have, as a rule, a composition indicative of a marine origin, and do not resemble solfataric or volcanic waters. Furthermore, Mendeleef's objection to the possibility of forming petroleum at the bottom of the sea—namely, that being lighter than water it would float away and be dissipated—is not only negatived by Sickenberger's observations, but also by the well-known fact that mud and clay are capable of retaining oily matters mechanically. The littoral sediments probably aid in the process of petroleum formation, if only to the extent of retaining the fatty substances from which the oil is to be produced.

The derivation of petroleum from vegetable remains has had many advocates, although the hypotheses have not all been framed on the same lines. L. Lesquereux, studying the Devonian oils of the eastern United States, argued in favor of their derivation from cellular marine plants, especially fucoids, whose remains abound in the petroliferous formations. Ligneous or fibrous plants, on the other hand, yield coal. This hypothesis led Vouga to suggest that great masses of fucus, like those of the Sargasso Sea, might sink to the bottom of the ocean, and there, decomposing under pressure, could yield petroleum. Redwood states that the salt marshes of Sardinia are sometimes covered by sheets of seaweed, which are in process of decomposition into an oily substance resembling petroleum, and similar occurrences have been noted on the coast of Sweden. These phenomena are probably not exceptional, and deserve a more precise examination than they have received hitherto. An observation by W. L. Watts, that the saline waters associated with petroleum in the central valley of California are unusually rich in iodine, appears to have some relation to this class of hypotheses. Watts connects this iodine with the familiar content of iodine in seaweed, and regards the latter as a probable source of this particular oil.

Data of this class might be multiplied almost indefinitely. For instance, C. E. Bertrand and B.

Renault have shown that Boghead mineral, torbanite, and kerosene shale, from which oils are distilled, are derived from gelatinous algae, whose remains are embedded in what was once a brown, humic jelly.

Kramer and Spiker's views have not met with very general acceptance, but they seem to contain elements of value. H. Potonie's hypotheses, for example, seem to be a broadening of Kramer and Spiker's. This writer calls attention to the "faulschlamm" or "sapropel," a slime, rich in organic matter, which is formed from gelatinous algae, and accumulates at the bottom of stagnant waters. Such a slime, Potonie believes, may be the parent substance from which bitumen, by a process of decay, was probably derived. In this connection, and with reference to the adequacy of the proposed source, it is well to remember the enormous accumulation of "oozes," namely, the radiolarian and globigerina oozes, on the bottom of the sea. The organic matter thus indicated is certainly abundant enough, if it can decay under proper conditions, to form more hydrocarbons than the known deposits of petroleum now contain.

These remarks upon the oceanic sediments at once suggest an intermediate group of hypotheses, which assume a mixed origin for petroleum. Animal matter in some cases, vegetable matter in others, or both together, are supposed to be the initial source of supply. A. Jaccard, for example, argues that the liquid oils are derived from marine plants, while the viscous or solid bitumens may originate from mollusks, radiates, etc. Some oils, again, are supposed to be of mixed origin, and it would seem probable that the last class is the most common. Ideas of this kind have repeatedly been enunciated with reference to American petroleums—that of Pennsylvania being attributed to marine vegetation, that of California to animal remains. The American literature of petroleum is rich in suggestions of this order.

Dr. Clarke concludes:

Wherever sediments are laid down, inclosing either animal or vegetable matter, there bitumens

may be produced. The presence of water, preferably salt, the exclusion of air, and the existence of an impervious protecting stratum of clay seem to be essential conditions toward rendering the transformation possible. Seaweeds, mollusks, crustaceans, fishes, and even microscopic organisms of many kinds may contribute material to the change. In some cases plants may predominate; in others animal remains; and the character of the hydrocarbons produced is likely to vary accordingly, just as petroleum varies in different fields (p. 703).

Quotations of this same general tenor could be added *ad libitum,* but certainly this is amply sufficient to prove that from the very beginning the organic origin of Petroleum has been accepted by nearly all authorities on the subject. While they may have differed as to just what class of organic remains the petroleum came from or as to the processes through which these remains passed in their transformation, the claim that the sources were organic has found comparatively few contestants, and the fact that the resulting petroleum is also organic, has found none at all, since, even those who held strongly for its deriviation from chemical reaction, in which mineral matters were involved, recognized the resultant as an organic substance. This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality (Clarke, p. 702). Furthermore, none of the process of mineral analyses are in anywise adapted to the study of petroleum, and those of organic analysis are the only ones that have been or can be used for determining its composition.

The three quarters of a century that passed between the publication of Reichenbach's statement in 1834, and that of Clarke in 1911, marks a great circle of research, which, after going far afield in search of all other possible sources, comes back at last to the starting point. Reichenbach's idea was that it was the oils and resins and waxes of plants from which the petroleum was derived and the dominant belief to-day is that of Engler and Hoefer, that

it is principally derived from the oils and resins and waxes of plants and animals.

Other materials may have contributed their quota to the general supply, but it is to the remains of the more minute plants and animals, which, in their decomposition through bacterial action produce such fatty materials, that the bulk of the product is due.

2. NONE OF THE PROCESSES HAVE ANY TENDENCY TOWARD MINERALIZING THE OIL, OR OF FOSSILIZING IT, OR PETRIFYING IT, OR IN ANY WAY CHANGING IT FROM AN ORGANIC SUBSTANCE TO A MINERAL OR INORGANIC SUBSTANCE.

MINERALIZE:

> To make mineral; to reduce to a mineral form; to impregnate with a mineral; to communicate the properties of a mineral to.
>
> (Webster).

MINERALIZATION:

> The act or process of mineralizing; the process of converting or being converted into a mineral as a metal into an oxide, sulphuret or other ore. The conversion of vegetable matter into coal is not properly mineralization, although sometimes so-called. Proper mineralization of vegetable matter does take place, however, as when wood is converted into opal, or becomes silicified, as very frequently happens, under certain conditions. This is commonly and properly called fossilization or petrifaction and more rarely mineralization.
>
> (Century).

Since the conversion of vegetable matter into coal is not properly mineralization, the similar process by which vegetable and animal matter is converted into petroleum cannot properly be called mineralization, and is not mineralization any more than the conversion of a birds food into guano can be termed mineralization. Both are alike formed from animal and vegetable substances through the

action of living organisms, and both remain organic substances.

The conversion of the organic substance petroleum to a mineral could only be made by such chemical change as would give it the characteristics of a mineral and thus reduce it to mineral form; or to impregnate it with a mineral or mineral matter which would also imply a similar chemical change. Either process would destroy its qualities as petroleum.

It is believed that many of the asphaltums are derived from the partial evaporation of petroleum and some of these become so nearly homogenous that they are given specific names, but even then they are not true minerals.

The process of formation has no tendency toward fossilizing or petrifying the petroleum, nor have the conditions under which it occurs in the earth.

The terms fossilizing and petrifying both imply mineralization.

A fossil is any evidence of the former existence of a living being. It may be either an organic or an inorganic, that is, mineral substance, although produced by organic processes. Shells and corals, although produced by living organisms, being composed of mineral matter, are mineral substances and those of periods preceding the immediate present are called fossils, if found either on the surface or below it. They may retain their original composition or they may be silicified (fossilized or petrified) or otherwise altered, but are always mineral substances.

Trees, on the other hand, are organic substances, and occur fossil in several ways. The cypress trees found in the Port Hudson clays of the Louisiana and Texas coast at depths from 100 to 1800 feet are fossil wood and as truly wood in structure and substance as when they were first buried.

In formations older than this, we encounter fossil tree trunks more or less lignitized or converted into lignite, but the substance of the tree is still organic. Occasionally we find a trunk which has been lignitized and a part of the lignite silicified or opalized; that is to say, the or-

ganic substance of the lignite has been replaced by the inorganic mineral silica through the process called silicification, petrifaction or fossilization, so that we have in the same fragment of fossil wood both organic, or non-mineral, and inorganic, or mineral, conditions. In place of silica, copper or iron may replace the lignite, so that the fossil wood may not only be a mineral, but an ore.

That nothing of this kind has taken place in connection with petroleum, is self-evident.

3. PETROLEUM IS NOT A MINERAL.

MINERAL:

> Any inorganic species having a definite chemical composition.
>
> (Webster).

> Any constituent of the earth's crust; more specifically any inorganic body occurring in nature and having a definite chemical formula and further having distinguishing physical characters.
>
> (Century).

> In its most enlarged sense—all substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of, and incapable of supporting, animal and vegetable life.
>
> (Bryan, Law of Petroleum and Natural Gas).

> A mineral then is any substance in nature not organized by vitality, which has a homogeneous structure. The first limitation here stated—not organized by vitality—excludes all living structures, or such as have resulted from vital powers. (J. D. Dana, Manual of Mineralogy, 1857-1871, p. 15).
>
> The third kingdom of nature, the Inorganic, embraces all species not organized by living growth. Unlike a plant or animal, an inorganic species is a simple chemical compound possessing unity of chemical and physical nature throughout, and alike in essential characters throughout all divers-

ity of age or size. (J. D. & E. S. Dana, Text Book of Mineralogy, 1883 to 1893).

A mineral is a body produced by the processes of inorganic nature, having a definite chemical composition, and, if formed under favorable conditions, a certain characteristic molecular structure which is exhibited in its crystalline form and other physical properties * * * Finally, mineral species, are, as a rule, limited to *solid substances;* the only liquids included being metallic mercury and water. Petroleum, or mineral oil, is not properly a homogenous substance, consisting rather of several hydrocarbon compounds; it is hence not a mineral species. (E. S. Dana, Text Book of Mineralogy, 1898).

Hydrocarbon Compounds.—The hydrocarbon compounds in general, with perhaps a few exceptions, are not homogenous substances, but mixtures, which, by the action of solvents or by fractional distillation, may be separated into two or more component parts. They are hence not definite mineral species and do not strictly belong to pure mineralogy, rather, with the recent gums and resins to Chemistry, or, so far as they are of practical value, to Economic Geology (E. S. Dana, System of Mineralogy, 1892, p. 996).

Appendix to the Hydrocarbons.—The substances included here are: 1, Petroleum, passing into the viscid bitumen, maltha or mineral tar; 2, the solid bitumen, Asphaltum; 3, Mineral Coal. These are in general more complex substances than those included in the preceding pages and have still less claim to be regarded as definite mineral species (E. S. Dana, System of Mineralogy, 1892, p. 1015).

Among all the definitions of a mineral there is not a single one that fits petroleum.

It has been shown that it is not inorganic, but organic; that it has no definite chemical composition, but is a mixture of several hydrocarbon compounds; that, being fluid, it has no distinguishing physical characters, in this respect differing even from water, which crystallizes in freezing. It is a fluid, and therefore not a part of the

solid body of the earth. The maggot-filled pools of the California oil fields prove that the oil of that region, at least, is capable of sustaining life. The evidence is clear that this oil has resulted from vital powers, and Dana, our best authority, states plainly that "Petroleum or Mineral Oil is not properly a homogenous substance, consisting rather of several hydrocarbon compounds; it is hence not a mineral species."

Therefore, Petroleum is not a mineral.

Furthermore, neither geologists nor chemists, nor mineralogists, consider it a mineral. If they seemingly write of it as such, it is because of a very loose construction of the term.

There are, so far as I can find, only two possible grounds for considering petroleum a mineral.

1. In its present condition, it shows no organic structure and may, therefore, be classed as inorganic, in which case, while not a mineral species, it might be called a mineral aggregate comparable to the clays, inorganic rocks, etc.

Lack of organic structure is, however, in itself, no proof whatever of the inorganic character of any substance. Sugar not only has no organic structure, but it has as definite a chemical formula and as distinct a crystalline form as salt or any other mineral, and yet it is a purely organic substance, and when pure, contains no mineral matter of any kind. The same is true of thousands of other organic substances in daily use.

Amber is another example; it is a fossil resin, being simply the gum from ancient pine trees of several species, exuded during life or produced during maceration and decay, and collected in beds of certain geological formations, from which it is mined by digging. It is a true organic substance, containing no mineral matter whatever, and yet has no more organic structure than has the resin exuding from our pines to-day.

The natural parrafins and other waxes are similarly organic substances with no trace of organic structure,

and some of these occur in the earth in such quantity as to be economically valuable, and are, therefore, mined.

Moreover, if lack of organic structure be sufficient to render a substance inorganic, the converse should also be true, and the presence of organic structure should be proof of the non-mineral character of any substance. This is clearly not the case, as is shown by the fact that in fossil wood the organic substance may be replaced by different minerals, silica, copper, iron, etc., and be changed thereby to an inorganic or mineral substance, and yet the organic structure be so perfectly preserved that the character of the original tree can readily be determined.

In all cases, therefore, it is the nature of the substance itself which determines its organic or inorganic character, and not the form in which it may occur.

Petroleum when pure contains no mineral matter of any kind, and has been clearly proven to be an organic substance. Since it is neither a mineral itself nor combined in any way with other mineral substances, it cannot properly be called a mineral aggregate.

2. The fact that it is gotten from the earth by what may be considered a species of mining.

This does not make it a mineral any more than amber or the natural waxes, which are won by actual mining, are mineral, or any more than guano, which is also dug from the earth, is made a mineral thereby, and no one, I think, for a moment would put guano down as a mineral, although it does at times furnish us, by solution and crystallization, more or less of the mineral niter or saltpeter.

The United States Geological Survey apparently treats petroleum as a mineral in their annual publication "Mineral Resources of the United States," but against this we have the statements of the members of the Survey that it is an organic substance, and, therefore, cannot be a mineral. While the publication is called "Mineral Resources," it had its beginning in a Report of the

Mining Industry of the United States, and since petroleum may be classed as a product of the mining industry, it was correctly included therein, but neither its inclusion in this report nor in those following it can make petroleum a mineral when it is not.

The only contention for the mineral character of petroleum, that I can find, is in its connection with land and with legal matters, and even then, many decisions can be found which plainly state its non-mineral character. From the few opinions I have read, it appears to me that in some cases, at least, the facts, as we now apprehend them, were not properly set forth. I think this is clearly shown in Section 4 of Bryan's Law of Petroleum and Natural Gas, page 11.

Petroleum is not technically a mineral, unless it be so by a legal technicality, and the opinion of the people, as contended for, is just that of the geologists.

Therefore, so far as this investigation goes, the only basis for the classification of petroleum as a mineral, is the decisions in the courts in connection with certain classes of land litigation that it is to be regarded as a mineral, while in other classes of litigation, they decided that it is not to be so regarded.

E. T. DUMBLE.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, APPELLANT,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

No. 280.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

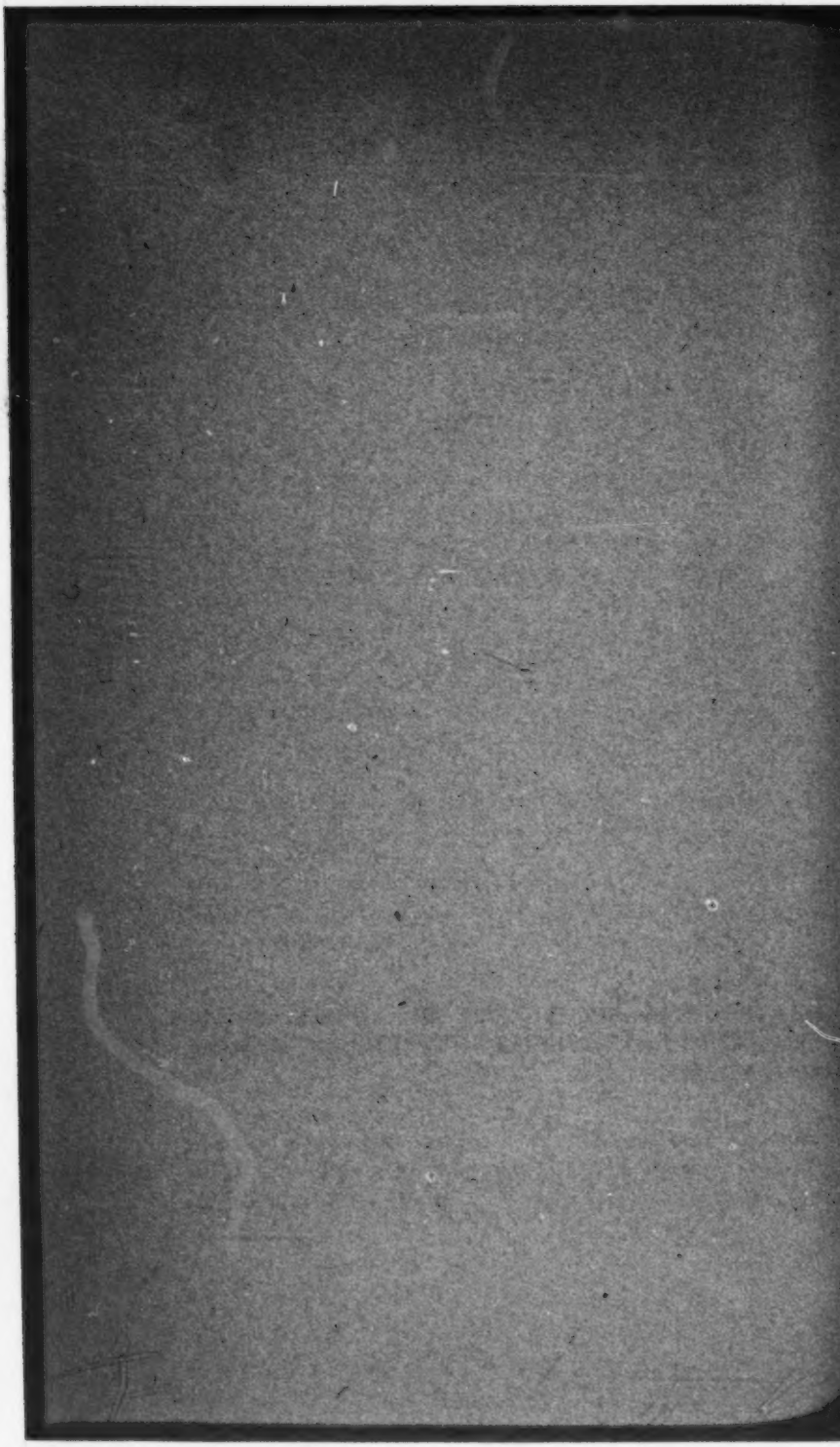
vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM ON BEHALF OF APPELLEES IN REPLY TO GOVERNMENT'S SUPPLEMENTAL MEMORANDUM.

GORDON M. BUCK,
A. A. HOEHLING, Jr.,
Of Counsel for Appellees.



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MEMORANDUM ON BEHALF OF APPELLEES IN REPLY TO GOVERNMENT'S SUPPLEMENTAL MEMORANDUM.

Mr. E. T. Dumble, who prepared the thesis entitled "Petroleum Not a Mineral," attached as an appendix to the supplemental memorandum filed herein on behalf of the

appellees, has long been a trusted employee of the Southern Pacific Company. He first entered the employ of one of the subsidiary companies of the Southern Pacific system in the year 1876. Though not at all times subsequently in its employ, he has continuously since 1897 been the consulting geologist of the Southern Pacific Company.

The thesis above referred to was prepared by him for the information of Mr. William F. Herrin, the chief counsel of the Southern Pacific Company on the Pacific Coast. It was forwarded by the latter to the late Maxwell Evarts, the then general counsel of the Southern Pacific Company in New York. Mr. Evarts subsequently decided to use the thesis as an appendix to the supplemental memorandum above referred to. Had Mr. Dumble known that the thesis was to be presented to this court, or used for publication, he would have prepared the manuscript with more care as to details. The thesis is substantially correct. There are, however, cases in which omissions have been made from quotations without indicating such omissions by asterisks.

In its supplemental memorandum the Government has attacked the accuracy of the thesis. The Government's memorandum lays stress upon the fact that in the formation of petroleum a geodynamic or pressure distillation process has occurred and that the omission of the thesis to recognize this part of the process as stated by White and Clarke has misrepresented their views. Yet, in summarizing Mr. Dumble's thesis the Government's memorandum, at the very outset, itself falls short of exact or even substantial accuracy. It says of Mr. Dumble's thesis (pp. 2-3):

> "This appendix dwells insistently upon the organic origin of petroleum and upon the organic processes of decomposition and putrefaction through the aid of micro-organisms to which the original vegetable or animal substances, of which petroleum may be said to be the ultimate (though not the immediate) derivative, have been subjected; and the entire trend of its argument assisted by the manner in which it selects and concatenates definitions and excerpts from

> the writings of scientific authorities is to make prominent the organic nature of the original substances and the organic character of the first processes of transformation so as to induce in the reader's mind the idea that the product itself must also be organic, and, consequently, nonmineral."

For the purpose of comparison the first point of Mr. Dumble's thesis which appears printed in the appellee's supplementary memorandum first in bold-faced black type and again in capitals on page 1 of the appendix is here quoted, as follows:

> "(1) Petroleum is an organic substance, a natural animal or vegetable oil or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of *distillation, rendering or refining.*"

This shows that Mr. Dumble, contrary to the inference sought to be conveyed, did have in mind and did mention both stages of the process of petroleum formation. He did not conclude, however, that the second stage in this formation changed the initial vegetable and animal matter into inorganic matter. In concluding that petroleum was still an organic substance, he applied the word "organic" as it is commonly used by scientists and others and in accord with the usual definitions as they are quoted on pages 1 and 2 of his thesis.

It thus appears that the fundamental difficulty with the present argument of the Government is that it raises a fictitious issue. It was not the purpose of the Dumble thesis to use the articles of Mr. White and Dr. Clarke to establish a claim that heat and pressure had nothing to do with the formation of petroleum. Such a contention was not required by fact, nor is it essential to the conclusion reached by him that petroleum is not a mineral. The obvious purpose of the argument by Mr. Dumble was to show that it was com-

monly agreed among scientists that petroleum is of organic origin. The present argument of the Government admits that there is such common agreement. We may, therefore, safely consider that this important premise is established.

The weak point in their argument is the assumption that an animal or vegetable substance becomes inorganic, and hence mineral, the moment life ceases and "geodynamic" forces have effected a physical or chemical change in the substance. Sanction for this assumption is sought to be supplied from the writings of Mr. David White and Dr. Clarke. As no such statement can be found in the writings of either, counsel have found it necessary to interpolate the words "organic" and "inorganic" in the extract from Mr. White's work quoted on page 6 of the Government Supplemental Memorandum. In this remarkable way there is introduced into the article written by Mr. White an arbitrary line between organic and inorganic substances, which Mr. White never attempted to draw and never recognized, as we shall show by other quotations from the same article. No authority for this line of distinction is given, other than the quoted statement from Mr. White's article with this arbitrary modification by counsel.

It is now asserted (p. 4) that Mr. White, in recent testimony, did say that his article would not support the contention made by Mr. Dumble, but would contradict it. Although we do not so understand his evidence, we do not feel that we can discuss with propriety in this case testimony claimed to have been given in another case, the record of which is not yet made. We shall, therefore, confine ourselves to the printed article of Mr. White, which was presumably written at a time when his mind was free from possible influence of pending litigation.

As there is no scientific authority for the line of distinction between organic and inorganic substances being placed where counsel for the Government have placed it, it was not to be expected that Mr. Dumble could have anticipated the necessity of meeting the arguments now based on this

fictitious assumption. The inference sought to be conveyed now that he intentionally omitted portions of the articles in question is, therefore, without support. The omitted portions were not necessary to the establishment of the point he was seeking to make and which is now conceded—that petroleum is of organic origin.

Every point sought to be made by the Government in its Supplemental Memorandum is based on this unauthorized interpolation of the words "organic" and "inorganic." As this basis is without scientific or popular recognition, conclusions drawn from it are not to be relied upon. An attempt is made, likewise without the citation of scientific authority, to attribute to substances produced or changed by given forces, the character of the forces themselves. Thus, it is said that a substance altered by the action of bacteria is still organic because vital forces have made the change. On the other hand it is said that when the change is accomplished by the forces of "chemical affinity, heat, pressure, etc." (p. 6), the resultant is an inorganic and mineral substance, because heat, pressure, etc., are "inorganic." Heat and pressure, even in nature and without the assistance of man, are commonly applied to animal and vegetable substances and produce marked changes by growth or other alteration, without any one thinking of the resulting substance being other than organic. If the "inorganic" character of the force is the determining factor, it can make no difference whether the force is applied by nature alone or by man. If the present argument of the Government is correct, the charred tree in the forest and the roast brought upon the table are equally inorganic, for in each life has ceased to act and heat has produced marked alteration. To be consistent with their own theory they must argue that each is now a mineral substance. The process of distilling whiskey from grain involves chemical and physical changes in which heat plays an important part, yet we do not anticipate that it will be seriously contended that whiskey is a mineral. Mine timbers have been compressed by caving rock until

they have been reduced to a small fraction of their original bulk and have lost all visible appearance of being wood, resembling rock in hardness and appearance. By the same reasoning this material must be classed as a mineral substance.

If the so-called "inorganic" forces acting upon organic matter necessarily produce "inorganic" substances, as now argued by the Government, it must follow by the same reasoning, that *organic* forces acting upon inorganic matter must produce organic substances in all cases. But such is not the case. It is, for instance, an accepted fact that rocks are often distintegrated and materially altered by plant acids and, in some instances, by living bacteria (Clarke, Data of Geo-chemistry, p. 460). No scientific authority will be found claiming that the compounds thus formed are *organic*, merely because the altering forces were organic.

It is true that the operations of "inorganic" processes or forces such as heat, pressure, etc., acting in the earth's interior on organic substances may destroy their organic structure and may change the organic compounds of the original animal or vegetable substances by rearrangement of the same hydrogen, oxygen, and carbon elements into other similar or even entirely different organic compounds. It is true also that various hydrocarbon compounds in living and dead organic substances on the surface of the earth undergo similar changes in chemical composition, both by natural and artificial processes, under the influence of these same forces of heat and pressure. The one class of processes which take place in the earth's interior and therefore termed "geochemical" or "geophysical" is neither more nor less mineralizing than the others taking place on the surface of the earth which are termed simply chemical or physical.

Such chemical or physical transformations, in themselves, are not recognized by either chemists or mineralogists as mineralizing processes.

To show this clearly it is only necessary to recall the fact that animal oils (lard oil, tallow oil, etc.) are produced by

rendering the fat of animals by heat, and by pressing the resulting substance at proper temperature, a process very similar to that claimed as the final stages in the production of petroleum. These forces certainly destroy the organic compounds but they do not thereby mineralize the oil or make it an "inorganic" substance of organic origin. It is only "inorganic" in the limited sense of not being organized or having organs similar to living things. It is not inorganic in the sense that it has lost the earmarks of an organic substance and has therefore become a mineral, or a mineral substance.

Scientific literature will be searched in vain for a determination of the point at which an organic substance becomes inorganic. The truth of the matter seems to be that scientists have never found it necessary to draw any such line. They have assumed, with apparent unanimity, that a substance is still to be classed as organic for some time after life forces have ceased. And, in accord with the common or unscientific usage, they do not seem to have thought it necessary to speak of substances as inorganic as long as their organic *origin* was apparent or probable, no matter how great the changes. Mr. White himself speaks of coal as an "organic" substance in numerous places without deviating from the customary scientific usage. In doing so he had in mind the fact that the material composing the coal is, largely if not entirely, the *same material* that originally formed the vegetable deposit. Coal is called organic because it possesses characteristics "peculiar to vegetable life and structure," which is one of the tests given in the Century Dictionary under the word "Organic."

Mr. White, who is announced as "Chief Geologist of the Geological Survey," in the argument of the Government, made the following statement in his article on "Some Problems in the Formation of Coal" in the June-July number of Economic Geology for 1908:

> "The sedimentary nature of our stratified coals is not now seriously questioned by any person pos-

> sessed of geological training. It is no longer necessary to argue that it is a stratified carbonaceous deposit of first-hand organic debris in which the vegetal elements greatly predominate, at least optically" (p. 292).

It is to be noted that he uses the term "organic" to describe the coal in its final form. This was not done by chance merely, as we shall show by other quotations from the same article. No process of interpolation of words can change the direct character of this statement.

Origin then, rather than present vitality, is the prominent factor commonly accepted in determining whether a substance shall be called "organic" or "inorganic." This is well shown by the introductory paragraph of a recent book entitled "The World's Minerals," by Leonard J. Spencer, of the Mineral Department, British Museum, and editor of the "Mineralogical Magazine," in which he says:

> "The natural objects found on the surface of our earth, or within its crust at a moderate distance from the surface, may be conveniently classified into three great groups or kingdoms—the animal, vegetable and mineral kingdoms. The two first embrace everything organic—that is to say, everything that is or has been, endowed with life; these are largely made up of the chemical element carbon combined with the elements (hydrogen and oxygen) of water. The mineral kingdom on the other hand, includes all inorganic bodies that have not been produced by the agency of life. Contrasted with materials of organic origin, they show a much greater diversity in the chemical elements that enter into their composition."

There is no suggestion in this statement that Mr. Spencer considered that a substance fell within the mineral kingdom the moment life forces ceased to act. He includes in the organic kingdoms everything that is or "has been endowed with life," thus indicating that origin is a controlling factor. Mr. Spencer does not include petroleum in his book

but does include coal and asphaltum in an extra chapter headed "The Organic Substances," saying in explanation: "In the systems of classification in mineralogy they are usually relegated to an appendix or omitted altogether. But on account of their great economic importance they cannot be completely neglected."

The actual mineralization of a nonmineral or organic substance can only be effected by addition or exchange of an element or elements not possessed before or by dissociation into its elements and consequent destruction of it as an organic substance. Mineralization of this nature is almost universally by replacement as in petrifactions, etc., or by the elimination of substances or elements until a final stable, or permanent, condition is reached as, for instance, graphitization. The substance then has a definite chemical composition as well as form and is a true mineral. As stated in the appendix, p. XXIV, nothing of the kind has occurred in the production of petroleum and it is therefore still an organic substance in the accepted meaning of that term.

As the Government charges that the opinions of Messrs. White and Clarke have not been correctly stated, it seems desirable to make further quotations from these two authors.

At page 5 of the Government's supplemental memorandum the following statement is made:

> "Mr. White's paper, when carefully studied, indicates the essentially inorganic nature of both coal and oil and shows that geodynamic earth processes have played a necessary part in their formation."

A critical reading of Mr. White's paper, "Some Problems of the Formation of Coal," does not show in any place a suggestion that he considers that the alteration of organic matter into petroleum or coal by biochemical or dynamo-chemical processes makes either the resulting petroleum or coal inorganic.

The following extracts from Mr. White's paper are pertinent (all italics below being by the writer of this paper):

"Everybody who has burned coal has probably observed that the ordinary coal, whether 'bituminous,' lignite, or anthracite, usually exhibits large quantities of the *remains or refuse of vascular plants*, of which only small fragments of the harder parts are preserved. The latter often constitute distinct *woody layers*, some of the pieces being rarely of very large size. In these coals the softer tissues have become obliterated through the macerative process and have doubtless contributed to the fundamental matter (liquid or 'jelly') in which the surviving and more resistant portions were bedded or suspended" (page 300).

"*Woody matter* is particularly abundant in the lignites ('xyloid') of North Dakota and the so-called No. 1 coal of western Illinois. Such fragments are abundant in practically all the coals of the interior basins. They are relatively scarce in certain other coals, such, for example, as some of the Texas lignites and certain 'splint' coals of the Appalachian trough" (page 301).

"It is not improbable, however, that algal matter enters in varying proportions into the composition of most of our coals, though it may be obliterated by putrefaction or masked by the predominant woody matter, or obscured by the opacity of those coals altered by dynamic influences. What may be the effect of these obscure or even invisible ingredients it is not yet possible to estimate. Undoubtedly they have in many cases exerted a large influence in shaping the characters and qualities of the coals. It is possible, for example, that some proportion of algal matter may be essential to the best coking qualities. In fact the writer is inclined to attribute to *algal* matter the fusibility of our coking coals" (page 301).

In this instance it is plain that the author's idea is that even in such coals as may have been altered by dynamic influences, this algal matter exists as such and is consequently still organic.

"For the observations made thus far tend, in the interpretation of the writer, to establish a fusion of the coal in combustion when the *algae are present in any considerable numbers.* This is a question that should be fully put to the test" (page 301).

"The writer is disposed also to believe that the bituminous elements derived from the fully decomposed animal remains have participated to a very important extent in the infiltration of the thalli of the *undestroyed algae,* thus enriching the latter with combustible matter of a distinctly *bituminous character*" (page 308).

"The paper coal of Tovarkovo, which consists of the *brown flexible cuticles of a lower carboniferous bothrodendron* stuck together in a *humic acid paste,* is perhaps nearest comparable to a *modern peat that is scarcely altered*" (page 313).

Nothing could be more clearly stated than the organic character of this coal.

"At the same time it is plain that, on account of the manifold vicissitudes to which the *original organic matter* is exposed from the time of its accumulation to the *moment of exploitation,* the relative amounts of the final residual matter must vary greatly, much of the ingredient material being totally destroyed, while the remaining proportions are reduced to obviously different stages or conditions. Some of it has gone into the probably variable composition of the fundamental ground mass and other amorphous liquid or volatile products; some of the cell walls were not completely broken down in the biochemical process, and these must have entered the dynamo-chemical period with compositions differing from that of the fundamental matter" (page 317).

Here he clearly states the organic character of the coal from the time of its accumulation to the moment of exploitation, and in the remainder of the paragraph he sim-

ply gives the various alterations through which the organic matter passes, none of which are claimed by him to have had any influence in changing it into an inorganic substance.

> "The degree of the deoxygenation of the *organic matter* is the true index of the progress made in the formation of coal; and it is, at the same time, also the index of the efficiency of the fuel. For, other things being equal, the efficiency of the coal, as measured in B. t. u.'s increases precisely as the oxygen is eliminated, whatever the class of the coal" (page 318).

"Deoxygenation of the organic matter" is in no sense a mineralizing process. He implies in the preceding paragraph that it is a continuous process "passing from cellulose or lignose through the series of peats, lignites, subbituminous, 'bituminous,' and anthracite coals." These various coals must therefore be organic matter or "deoxygenation of the organic matter" would be impossible in them.

These extracts begin with the first page of White's article and end with the last, and could be multiplied, if necessary. But they are sufficient to show beyond question that the organic nature of the resulting coal is fully recognized.

At page 6 of the Government Supplemental Memorandum occurs the extract from Mr. White's article in which the words "organic" and "inorganic" have been interpolated, as already stated. This portion of the memorandum reads:

> "At page 311 of his paper, in closing the discussion of the first or organic stage, Mr. White says:
>
> "'In the preceding pages attention has been confined mainly to the initial stage of coalification, *i. e.*, the decompositon of the organic matter through the agency of micro-organisms, among which the anaerobic bacteria are primarily indispensable. This process, which is essentially *biochemical* (organic), probably leads no further than the formation of peats, humus, recent sapropelic deposits, humic concentrates, etc. It remains to consider the

second, or dynamo-chemical (inorganic) stage of coalification—the transformation, as the direct or indirect result of dynamic influences, of the coalifying material into lignite "bituminous" (humic) coals, anthracite, etc.' "

"NOTE.—The words 'organic' and 'inorganic' inclosed in parentheses in this quotation are inserted by the writer of this memorandum."

"Reading this quotation and the matter following on pages 312 to 318 in connection with the paper as a whole, it seems entirely manifest that in the author's opinion the bitumens, including both coal and petroleum, regardless of the character of the matter from which they are originally derived, are in the end the products of inorganic geochemical and geophysical forces. Quotations, therefore, which fail to direct the attention to the final or *inorganic* stage of the process, but which are confined solely to the author's discussion of the initial or *organic* stage, are signally misleading. The entire matter quoted in the Dumble appendix is from the discussion of the first stage found in the pages preceding page 311 of the original paper, and no part of it is taken from any portion of the discussion of the second stage."

A careful reading of Mr. White's article will show that petroleum is not once mentioned or even alluded to directly or by implication in the description of the second stage, beginning on page 311 under the subheading: "Part Taken by Dynamic Agencies in Coalification."

In this connection the Government's supplemental memorandum continues (pp. 7-8):

"The borrower of these quotations also passed over a significant paragraph almost immediately preceding the one he first selected, viz. (page 303):

" 'The ordinary process of coalification of an accumulation of organic debris embraces two stages of prime importance: (*a*) The putrefaction stage which is, at least dominantly, biochemical; and (*b*) the alteration or metamorphic stage, which is dynamo

> chemical, being induced and regulated, in the main, by geodynamic influences. The latter embraces phenomena ranging from pressure-dehydration and lithification, to graphitization.' "
>
> "Thus, even in his discussion of the initial or *organic* stage of the process, Mr. White outlines clearly the second or *inorganic* stage of dynamo-chemical alteration."

So far as petroleum is concerned, neither lithification nor graphitization have had any part in its production, as it is manifestly neither stony or graphitic. Moreover, pressure-dehydration in nature is no more a mineralizing agent than similar pressure in a cottonseed oil mill, nor has it in its action in producing petroleum done anything whatever to change it from an organic to an inorganic substance.

On page 311 Mr. White states:

> "There is little doubt in the mind of the writer that the oils and gases of the mesozoic and tertiary, as well as of the paleozoic, are directly derived, in most cases at least, from dynamic distillation of algal debris, though in part originally of animal origin."

He thus clearly and specifically removes the production of petroleum from the operations of such other processes (lithification, graphitization, etc.) included in or suggested by the above extracts, as might change it from an organic to an inorganic substance.

The Government's supplemental memorandum states (pp. 8-9):

> "Again, the appendix vouchsafes no indication of a certain important omission of substance occurring after the fifth quoted paragraph on page xvii. viz. (from White, p. 298):
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> " 'The discovery of hydrocarbon-bearing strata composed largely of such organisms in rocks as old as the Ordovician strongly suggests an algal origin

for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian.'"

"Here Mr. White suggests the metamorphism induced by purely *inorganic* agencies, by which a substance of admittedly *organic* origin (algae or seaweeds) has been transformed into a well-recognized mineral substance—indeed, a mineral species (graphite)."

In this particular case Mr. White argues from the fact that large quantities of algal remains are found in less altered sedimentary rocks of Ordovician age, that the graphites interbedded in older and more strongly altered rocks may have been similarly algal remains transformed into graphite. In other words, that the organic matter (hydrocarbon) of the algae has been entirely dissociated and simply a part of one of the original elements (carbon) left as graphite, a recognized mineral. This is his phenomenon of "graphitization," which does not have any bearing on or connection with the production of petroleum.

The Government's supplemental memorandum closes the discussion of quotations of Mr. White's paper as follows (p. 9):

"As the result of similar selections and omissions the tendency of the quotations in the appendix is to give the impression that White wrote only of the organic phases in the evolution of petroleum and to instill the belief that he regards petroleum as wholly organic both in origin and in mode of derivation. This is wholly fallacious."

The reason Mr. White's discussion of the second or inorganic stage is not mentioned in the appendix is that Mr. White himself does not mention petroleum in it.

The Government's supplemental memorandum states (pp. 9-10):

"On pages xviii, xix, and xx the appendix quotes liberally from Mr. Clarke's work on the 'Data of Geochemistry,' as a basis for claiming support from

> that work for the proposition that petroleum is an *organic* substance, and, therefore, a nonmineral substance."

Dr. Clarke does not in any portion of the chapter on The Natural Hydrocarbons intimate in any way his belief that any of the processes taking part in the production of petroleum destroy its organic character or change it to a mineral substance.

This valuable article is, as it states, "a critical summary of what is now known," and Dr. Clarke, giving less attention to the various processes of derivation, confines himself principally to the materials from which petroleum has been derived, and simply illuminates his summary of the discoveries and theories of others by a question in one place and a suggestion in another, seldom making concrete statements of his own views.

Dr. Clarke says (pp. 697-8):

> "Engler himself ascribes the derivation of petroleum from animal remains to a putrefactive process, which removes the nitrogen compounds. The fats remain, to be altered by heat and pressure into hydrocarbons, whose boiling points lie below 300°; and these later undergo a partial autopolymerization into denser forms. How far such a polymerization may be possible, if indeed it is possible at all, is a matter of uncertainty. C. F. Mabery holds that the changes are always in the opposite direction, and that the more complex hydrocarbons are formed first, partially breaking down afterward into lower members of the series. J. Marcusson holds the same view. The putrefactive removal of the albuminoid substances is also to be questioned, and it is certainly not universal."

This is the part of the quotation claimed by the Government to have been omitted in the thesis. In it Dr. Clarke gives Engler's views and brings against their correctness the uncertainty that the polymerization is possible, the contrary

views of Mabery and Marcusson, and even questions a part of Engler's theory of the putrefactive process. The portions of this quotation italicized in the Government's supplemental memorandum (p. 10) are not Dr. Clarke's views, but Engler's. The thesis gives (appendix, p. xv) Engler's views in full from one of his latest statements. Hence, it was not thought necessary to repeat them in the quotation from Dr. Clarke:

> "This observation may be correlated with the views advanced by J. S. Newberry and S. F. Peckham, who regard the liquid petroleums as natural distillates from carbonaceous deposits, which latter were laid down at depths below the horizons where the oil is now found. The heat generated during metamorphism is supposed to be the dynamic agent in this process, although many productive regions show no evidence that any violent metamorphoses have ever occurred" (Clarke, p. 700).

This is another of the omitted quotations (see Supp. Mem., pp. 11-12). The views of Newberry and Peckham had been fully given earlier in the thesis (appendix, pp. xi-xiii), and it was deemed unnecessary to repeat them, especially as Dr. Clarke cast serious doubt on the supposed dynamic agent as suggested by them by his statement, "Many productive regions show no evidence that any violent metamorphoses have ever occurred."

The portions of the quotation omitted in the thesis and italicized in the Government's supplemental memorandum (pp. 11-12) are not stated by Dr. Clarke as his own views, but as those of Newberry and Peckham. Even were they his views, the distillation of petroleum from organic materials by dynamic heat would not render the petroleum inorganic, unless it were carried to the point of absolute destruction or dissociation of the hydrocarbons and the formation of graphite.

Dr. Clarke states, at pages 698 and 699:

> "F. Heusler also, while indorsing Engler's principal conclusions, invoked the aid of aluminum chloride as an agent in effecting a polymerization of the hydrocarbons. According to Ochsenius's theory, magnesium chloride was the active substance. These suggestions are of very little value, for the reason that the laboratory reactions with aluminum chloride are effected with the anhydrous salt, and not with its hydrolyzed aqueous solutions. It is not shown experimentally that the latter would be effective, nor does aluminum chloride occur in any notable quantity in natural waters. A more probable function of the salts, according to R. Zaloziecki, is to retard and modify the decay of animal matter on or near the seashore, and so to give time for its transformation into petroleum."

This is the only mention by Dr. Clarke of any possible mineralizing agencies in connection with the production of petroleum, and neither he nor the writers he quotes suggest that the action of these agencies has the slightest tendency toward mineralization of the petroleum. In the one case it is claimed that they act as agents in effecting a polymerization (which is in no way a mineralization), and in the other that they act as simple preservatives.

Dr. Clarke says further (p. 704):

> "By whatever class of reactions petroleum is generated, it doubtless appears first in a state of dissemination. How does it become concentrated? This question does not fall within the domain of chemistry, and cannot be properly discussed here. Probably circulating waters have much to do with the process, but whatever that may be, the laws governing the motion of liquids must inevitably rule. The oils must gather in proper channels, moved by gravitation, or by hydrostatic pressure of waters behind or below them, or by the pressure of dissolved and compressed gases, and they accumulate in porous rocks or cavities under layers of impervious material. When the latter are lacking, or when the hydrocarbons enter large areas of porous rocks, they may be

> either evaporated or rediffused. Pressure, temperature, viscosity, and the character of the surrounding rocks must all be taken into account, and each productive area needs to be studied independently with reference to its local conditions."

Without committing himself to the class of reactions by which petroleum is generated, he here outlines some possible methods of its concentration, but in no place does he even suggest that either in its formation or concentration the organic material is altered into an inorganic substance.

On pages 12-13 of the Government's supplemental memorandum the following statement is made:

> "At page xxi of the appendix the author, in contending that petroleum is an organic substance, observes:"
>
> " 'This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality' " (Clarke, p. 702).
>
> "An examination of page 702 of Clarke's 'Data of Geochemistry' fails utterly to support any such statement. Neither on that page nor elsewhere does Mr. Clarke use the expression 'organic oils.' The transposition of his reference to oil of 'organic origin' into the expression 'organic oils' is not justified at any point by Mr. Clarke nor by any authority mentioned in the appendix; neither does the most liberal construction of any authority cited in the appendix justify in the slightest degree the further statement on page xxi that 'even those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved, recognized the resultant as an organic substance.' "

The fact that an oil of organic origin is an organic oil unless mineralized or rendered inorganic, which is not the case with petroleum, has been clearly brought out in this discussion. The further truth that "those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved recognized the resul-

tant as an organic substance" is fully proven by the fact that in all their investigations of petroleum they used the methods of organic analysis.

On page 14 of the Government's supplemental memorandum is the following statement:

> "It should be noted that practically all the authors quoted by Mr. Dumble recognize the distillation or transformation (inorganic) process in connecting the organic substance into petroleum. The geodynamic processes to which the original organic materials have been subjected have resulted in new products which are inorganic."

The statement that petroleum in the process of its formation is subject to such radical change as transformation into an inorganic substance, or to any radical change in fact, is based on mere hypothesis. In the two articles which have been under consideration there is only one reference to direct observations on the production of petroleum. This is found in Dr. Clarke's paper, p. 699, and is quoted on page xviii of appendix:

> "E. Sickenberger has shown that in small bays of the Red Sea, where the salinity reaches 7.3 per cent, petroleum is actually forming as a scum upon the surface of the water. Living forms are abundant in these bays, and their remains, after death, furnish the hydrocarbons. The latter are to some extent absorbed into the pores of coral reefs, and so contribute to the formation of bituminous limestones. A still earlier publication by O. F. Fraas, contains data of similar purport."

Dr. Clarke quotes this and casts no doubt on the correctness of the observations, and here we have the observed fact of the direct formation of petroleum from organic matter on the surface of the earth without any intervention what-

ever of geodynamic forces. This is the only record of its actual production mentioned by either Clarke or White. If, then, petroleum can be and is actually produced on the surface, why call in outside and unproven action of geodynamic forces to account for it?

A careful comparison with the original publications of all quotations in the thesis as printed in the appendix, other than those from White and Clarke, reveals only two inaccuracies.

On page xiii the second quotation is not literal, although expressing the exact sense of original. The third quotation, beginning on that page, is verbatim from Dr. Orten's paper, "Report on the Occurrence of Petroleum, etc." Geol. Sur. Kentucky, 1891, pp. 43, 44, 45, and not from the paper in U. S. Geol. Sur., vol. 8, p. 494, as stated. The two papers, as noted in the statement of authorities on page iv of appendix, are, for the most part, identical in wording, as they are identical in meaning, but there are occasional differences in expression appearing in the print of said two reports (U. S. and Ky., *supra*) of the paper, but which in nowise alter the meaning.

As regards the quotations from the papers of Mr. White and Dr. Clarke, the only error occurring in the appendix is in the quotation from Dr. Clarke at the middle of page vi, where, through clerical error, three words have been omitted. The sentence, instead of reading, "The organic origin of petroleum, however, seems supported, etc.," should read, "The organic origin of petroleum, however, seems *to be best* supported, etc."

In no other instance is there a difference of a word in the quotations as given, nor, it is respectfully submitted, are any of the quotations arranged in such manner as to convey any meaning other than that conveyed by the full context of the paper from which they were taken, as herein above fully explained.

After the court's long acquaintance with the late Max-

well Evarts, it will not, we feel sure, believe that there was any intention to misrepresent the authors quoted, or in any way to mislead the court, nor do we believe that such misrepresentation has occurrred.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

J. I. Lamprecht and F. M. Aiken, (Trustees),
Appellants,
vs.
Southern Pacific Railroad Company, (a corporation), Kern Trading and Oil Company, (a corporation), and T. S. Minot;
Appellees.

Brief on Behalf of Appellants on Questions of Law Certified by the Circuit Court of Appeals for the Ninth Circuit.

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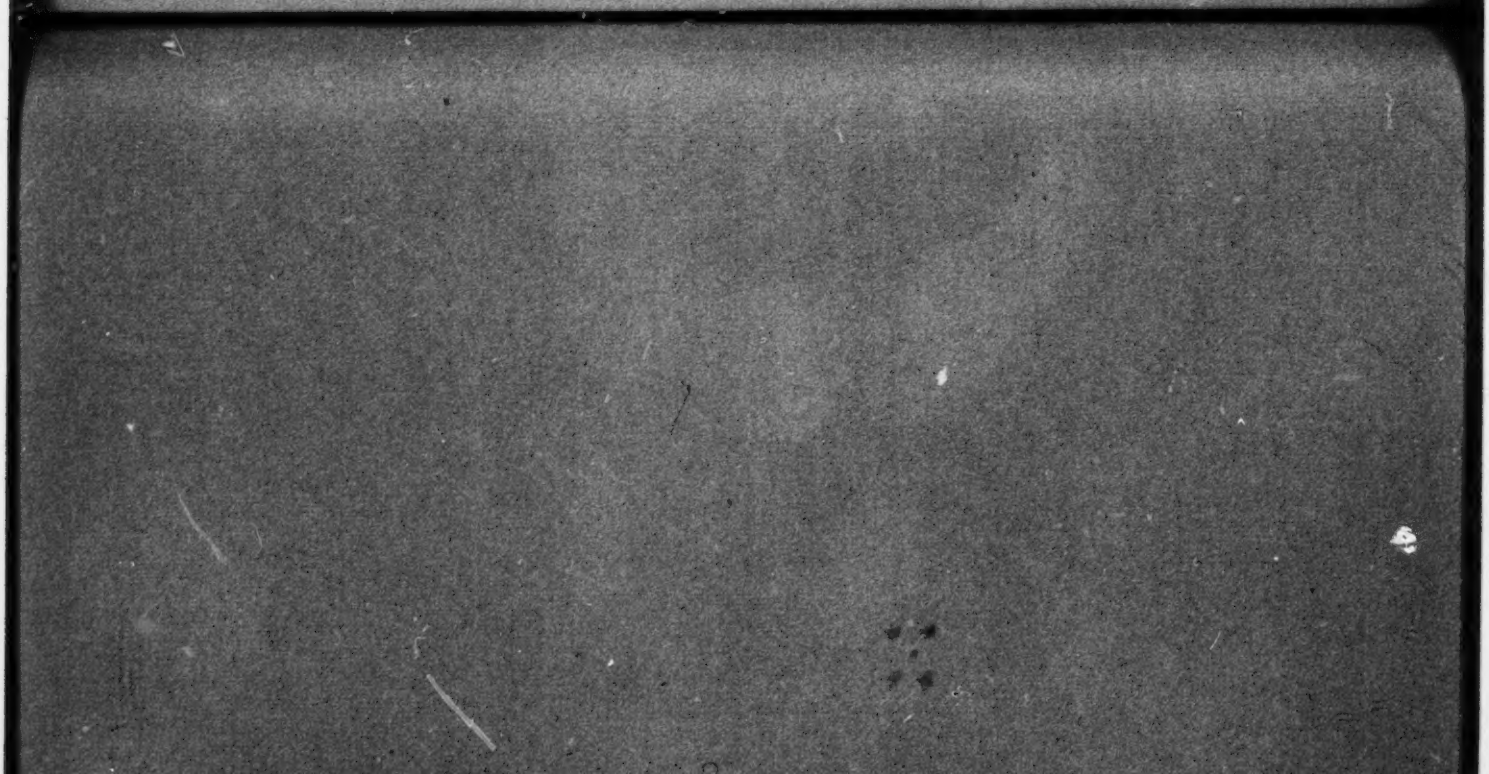

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

J. I. Lamprecht and F. M. Aiken, (Trustees),
Appellants,

vs.

Southern Pacific Railroad Company, (a corporation), Kern Trading and Oil Company, (a corpopation), and T. S. Minot;
Appellees.

Brief on Behalf of Appellants on Questions of Law Certified by the Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS.

This cause comes into this court by certification of certain questions of law by the Circuit Court of Appeals for the Ninth Circuit, upon its own motion, under the provisions of the judicial code (Sec. 239, Act of March 3rd, 1911). The certificate sets forth the facts upon which the questions of law are certified and reads as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

EDMUND BURKE,

Appellant,

vs. No. 1981

The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation),

Appellees.

and

J. I. Lamprecht and F. M. Aiken (trustees),

Appellants,

vs. No. 2028

The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation) and T. S. Minot,

Appellees.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by

Congress on July 27, 1866 (14 Stats. 292), and the Joint Resolution of Congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by Congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and

application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

That under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any

physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part of any thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court

holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted in this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and affect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions, the following questions are hereby certified to the Supreme Court of the United States for its decision:

First: Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without

any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Sixth: Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company,

and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge;
WM. W. MORROW,
Circuit Judge;
CHAS. E. WOLVERTON,
District Judge.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under Section 134 (239) of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

I.

The parts of the act which specify the terms and conditions of the grant read as follows:

"Sec. 3. And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; * * * provided, further, that all

mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided;

"And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; * * *"

The fourth section of said Act of Congress, which provides for the issuance of patents under the grant, reads as follows:

"Sec. 4. And be it further enacted, that whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been

constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"Sec. 18. And be it further enacted, that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have the uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

Congress also passed a joint resolution approved June 28, 1870, which reads as follows:

"Be it resolved, etc., that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by

the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seven, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seven, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

The Commissioners of the General Land Office, in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had been followed by the officers of that department in such cases for 40 years, recommended to the then Secretary of the Interior as follows, to-wit:

"It is hereby recommended that the tracts described" (in said list) "covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act as aforesaid to the said Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may be issued 'all mineral lands' should any such

be found in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron.

G. W. LAMOREAUX,
Commissioner."

And the then Secretary of the Interior approved said recommendation as follows:

"Approved; covering 440,900.85.

HOKE SMITH, *Secretary.*"

ARGUMENT.

As the proper answers to all of the questions certified are determined by rules established by this court in the construction of the statute, we shall show what those rules are and then by reference to them (see page ..) the court may be assisted in answering the questions.

THE STATUTORY GRANT, BEING IN PRAESENTI, PASS THE TITLE GRANTED AS OF ITS DATE UPON THE FILING OF THE MAP OF DEFINITE LOCATION OF THE ROAD, OF ALL LANDS GRANTED BY IT, AND OF NONE OTHER.

This proposition is so thoroughly established by the decisions of this court that nothing more than citations of the authorities is necessary to sustain it; but in this case the question is, To what lands the title granted attached, and as the language of the authorities, read in connection with others which will be cited, reveals the answers to the questions propounded by the court, we will quote:

> Schulenberg v. Harriman, 21 Wall. 44, 60:
>
> "That the Act of Congress of June 3rd, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, *'that there be and is hereby granted* to the state of Wisconsin' the lands specified."

In Leavenworth etc. R. R. Co. v. United States, 92 U. S. 733, 741, this court said:

> "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in praesenti*. This court has held that they can have no other meaning and the land department, on this interpretation of them, has uniformly administered every similar grant. Railroad Co. v. Smith, 9 Wall. 95; Schulenberg v. Harriman, 21 *Id.* 60, 1 Lester 513; 8 Opin. 257; 11 Id. 47. They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the parcels selected as if it had specifically described them."

In Missouri, Kansas etc. Railroad Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, this court said:

> "As between the United States and the plaintiff, the right of the latter to patent became perfect on approval by the President of the report of the Commissioners. The Act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is 'There be and is hereby granted' to it the odd sections mentioned,—words which import a grant *in praesenti*, and not one *in futuro*, or the promise to grant. * * * When the location (of the road) was made and the sections granted ascertained the title of the plaintiff took effect by relation as of the date of the act, except

> as to the reservations mentioned; the act having the same operation upon the sections as if they had been specifically described in it."

"The reservations mentioned" are of lands not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the date of the location of the road.

In Railroad Co. v. Baldwin, 103 U. S. 426, 429, this court said:

> "The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in praesenti*. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operations by the clauses mentioned. This is the construction given by this court to similar language in other acts of Congress. Missouri, Kansas etc. R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 491; Leavenworth, Lawrence & Galveston R. R. Co. v. U. S., 92 *Id.* 733."

"The clauses mentioned" which are here held to reserve lands from the operations of the act are those which except lands sold, reserved, homesteaded and pre-empted.

Again in St. Paul and Pacific R. R. Co. v. Northern Pacific, 139 U. S. 1, 5, 6. This court said:

> "As seen by the terms of the third section of the act, the grant is one *in praesenti;* that is, it purports to pass a present title to the land designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is: 'That there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, and not a promise to transfer one in the future.
>
> "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.
>
> "This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence etc. R. R. Co. v. U. S., 92 U. S. 733."

It will be noticed that in none of the cases above quoted is the exclusion of mineral lands from the operations of the act raised, and that these cases uniformly hold that the title vested *in praesenti*, upon the definite location of the road as of the date of the granting act, to all the odd numbered sections within the primary limits of the grant which had not, prior to the location of the route been reserved, sold, granted or otherwise appropriated and which were free from other claims or rights. The records of the Land Office would at all times show what of the lands within the limits of the grant were excepted from it for those reasons, because a complete record of them was required by law to be made and kept in the Land Office. But there was another class of lands excluded from the operations of this act, and it was, in the very nature of the situation, impossible to make or keep a complete record of them before the company's title would attach to the odd sections; and this brings us to a second proposition which has been clearly established by the decisions of this court, viz.:

II.

The Exclusion, by the Statute, of all Mineral Lands from Its Operations, Being in Praesenti, Excluded from the Grant, in Its Creation and by Its Definition, All Mineral Lands, Whether Known or Unknown to Be Such.

This phase of the grant was considered by this court in Barden v. Northern Pacific, 154 U. S. 288. That was a case in ejectment by the railroad company against mineral locators. Plaintiff claimed under the Northern Pacific grant, Act of July 2, 1864, c. 217 (13 Stats. 365), the land was included in a list of selections which had been approved by the officers of the local land office and by the Secretary of the Interior for patent, before mineral was discovered in the land, as lands inuring to the railroad company under its grant after the road had been built and accepted. No patent had issued.

The contention of the railroad company was that the clause "That all minerals be, and that the same are hereby, excluded from the operations of this act," applied only to lands which were known at the date of the grant, to be mineral. In that case the court held, page 213:

> "It is also true that the grant was one *in praesenti* of lands to be afterwards located. * * * It would not be known where they would fall until the line of the

road was established; then the grant attached to them, subject to certain specified exceptions; that is the sections or parts of sections which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of were excepted, and the title of its other sections or parts of section attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by condition annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The location of the sections and the exceptions from other causes in no respect affects that one or limits its operations."

The court then points out that Congress has power to make a statutory grant and to reserve thereby mineral lands, whether known or unknown, and that knowledge or lack of knowledge of the mineral character of the lands excluded and reserved could in no way have the effect of bringing them within the terms of the grant, which expressly excluded them from its operations. The opinion then points out that in the cases of St. Paul and Pacific R. R. Co. v. Northern Pacific Company, 139 U. S. 1, 5, and Desert Salt Co. v. Tarpey, 142 U. S. 241, 247:

"It was never asserted or pretended that they decided anything whatever respecting

> mineral but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was that title? It was of the lands which *at the time of the grant* were not reserved as minerals, and of the lands which *at the time of the location* had not been sold, reserved, or to which a pre-emption of homestead right had not attached." Pages 314, 315. (Italics ours.)

In this connection the court points out that in cases where conveyances except, exclude or reserve from their transfer of title minerals, mines or quarries contained in the lands described in them, such exceptions, exclusions and reservations are universally held valid whether the minerals so withheld from the conveyance are, at any time, known or unknown. Then, to explain that the exclusion of all mineral lands from the grant must be held effective as to unknown mineral land, the court says:

> "And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any severable products thereof, whether mineral or quarries contained therein, and whether known or unknown; yet, such must be the contention of the plaintiff or its contention will fall to the ground." Page 115.

Then, to emphasize that there is no reason why the exclusion of all mineral lands from the operations of the statute should not continue to

be effective after the identification of the odd section, the court says:

> "If one were to sell land, reserving therefrom the minerals of gold and silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold, the reservation of the minerals then undiscovered would be eliminated? Would anyone uphold the reasoning, or the doctrine, which would assert such a conclusion? And can anyone see the difference between the case now before us and the one supposed?" Page 115.

Again, in the Barden case, speaking of the ruling of the court in the St. Paul and Pacific Co. v. Northern Pacific Co., 139 U. S. 1, 5, and Desert Salt Co. v. Tarpey, 142 U. S. 241, 247, and other cases of similar import, the court says:

> "In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then undisclosed. The grant did not exist without the exceptions of minerals therefrom, and Congress has declared, in positive terms, that the act shall not be construed to embrace them, and there is nothing in any of the cases cited in the plaintiffs' contention which indicates in the slightest degree that the original exception was subsequently qualified.
>
> "It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not

merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral *at the time of the grant,* and also those which were not reserved, sold, granted or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections nearest the line of the road might be selected. There is in our judgment a fundamental mistake made by the plaintiff in the construction of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited, were specifically reserved to the United States and excepted from the operations of the grant. Mineral lands being *absolutely reserved from the inception of the grant,* Congress further provided that *at the time of the location of the road* other lands should be excepted, viz., those previously sold, reserved or to which a homestead of pre-emption right had attached." (Italics ours.)

The language of the court in that case is susceptible of but one interpretation, viz., *that Congress by the granting act created, defined and conveyed a title which, by reason of its very nature, could not attach to any mineral lands.*

Whether or not such a grant could be lawfully made or such a title be lawfully created under the common law, *or under the provisions of other statutes,* is of no importance in this case. Congress is a lawmaking body and the Constitution entrusts to it exclusively the making of laws, rules and regulations respecting the public lands, and it can create any kind of a title or make any kind of a grant it desires of them. This leads us to another proposition established by the ruling of this court.

III.

The Granting Act Is a Special Statutory Law, Intended and Designed by Congress Exclusively to Define and Control the Grant Made by It, and Must Be So Construed as to Carry Its Intent and Purposes Into Effect.

All grants of public lands to states and corporations to aid in the construction of railroads have been made by special Acts of Congress. In no instance has a general statute been passed authorizing any officers to grant any lands for such purpose. This circumstance and the fact that all such grants are made *in praesenti* show, beyond question, that Congress has always been unwilling to entrust to executive or administrative officers the making of such grants under prescribed rules and regulations. Congress has always held firmly to the policy of treating such grants as a subject requiring its special consideration and special legislation, because it did not deem it wise that the rules of law derived from construction of general statutes providing for the disposition of public lands by patent should be applied to railroad grants. There is no other possible explanation of the uniform policy of Congress on this subject. It must be remembered that Congress made this grant by special statute, which is the law of the case, and which withholds from all administrative, executive and

other officers all authority to grant any land under or by virtue of it. It expressly withholds from its conveyance all mineral lands, whether known or unknown, and its plain provision, designed and intended for that purpose, has been, ever since its approval, and is now, and will be until abrogated, the law on the question involved in this case, viz.: Did the railroad company acquire title to a billion dollars' worth of mineral land by or under this statute which states that it shall acquire no mineral lands by or under it? It cannot be denied that Congress exercised an exclusive power in making this grant, for in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 504, this court said:

> "The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property of the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. VanBrocklin v. State of Tenn., 117 U. S. 151, 168."

Nor can it be denied that the provisions of the statute which withhold all mineral lands from its conveyance must be liberally construed in favor of the public and full effect given to those provisions, because the granting act is a law as well as a conveyance. In Missouri, Kansas etc. Railroad Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, this court said:

> "It must always be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of a common law which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power of identification exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

In Barden v. Northern Pacific, 154 U. S. 288, 319, this court in speaking of the Northern Pacific grant, said:

> "To incorporate the term 'known' into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed."

And on page 321 of the same opinion, speaking of the same grant, the provisions of which are the same as the provisions of this grant, the court said:

"The language of the grant to the plaintiff is free from ambiguity. The exclusion of all mineral lands from its operation is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel a construction favorable to the grantor."

And again, on page 325 of the same opinion, the court says:

"In Leavenworth Railroad Co. v. U. S. 733, this court said: 'The rules which govern the interpretation of legislative grants * * * apply as well as grants of lands to states, to aid in the building of railroads, as to grants of special privilege to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake. * * * If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor.'"

And:

"In Winona etc. Railroad Co. v. Barney, 113 U. S. 618, 625, speaking of the construction of legislative grants, the court said:

"'They are to receive such a construction as will carry out the intent of Congress, however difficult it may be to give full effect to the language, if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condi-

tion of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'"

It would seem that the cases already cited would be sufficient to warrant the court in answering all the questions in the certificate adversely to the contentions of the appellees, but, as in the court below they claim to derive title from some source other than the granting act, we will show that such claims are without foundation because:

IV.

The Grant in Praesenti, Contained in the Granting Statute, and in the Definition and Creation of Which Both Known and Unknown Mineral Lands Are Expressly Excluded, Is Appellees' Only Source of Title.

Because:

1. *Neither the granting act nor any other statute confers upon any officer authority to grant any lands to the grantee named in the granting act.*

2. *The office of the patent provided for in the statute is not to make a grant of lands, nor to alter in any particular the grant made by the statute, but is to confirm to the grantee "the right and title" granted to it by the statute.*

3. *The statute contains no provision which expressly or by implication obliges the officers of the Interior Department to segregate the mineral from the non-mineral lands contained in "said lands situated opposite to and coterminus with" the completed sections of the road before issuing patent therefor.*

4. *There is no reason for implying from the nature of the grant an intent on the part of Congress that the mineral lands should be segregated from the non-mineral before patent is issued.*

5. *The patent issued does not show a determination by the officers of the Interior Department that all the lands described therein are non-mineral, but it shows that no such decision was made.*

6. *The presumption raised by a grant made by a patent issued under authority of a general statute, that the land so granted is of the character authorized by such statute to be granted, is not raised by a patent issued under the provisions of this granting act.*

7. *The Secretary of the Interior had the right to insert the mineral exception clause in the patent:*

(a) *By virtue of his discretionary powers.*

(b) *Under the express provisions of the joint resolution of June* 28, 1870.

(c) *Under the statements of this court in the Barden case and other authorities.*

(d) *Under the Joint Resolution of January* 30, 1865.

1. It cannot be said that the officers of the Interior Department possess any power or authority, except that given to them by acts of Congress, to grant lands to railroad companies to aid in the construction of their road, nor that any general statute gives them such authority. It must be admitted that if those officers ever had any authority to grant these lands to this railroad company, such authority must be found

in the fourth section of this special granting act or in the joint resolution of June 28th, 1870, which provides for the issuance of patent to the company under the act which makes the grant.

Did Congress intend in making a private grant *in praesenti*, of public lands, by special statute, to authorize the executive or administrative officers to add to that grant or to change, in any manner or by any means, the grant or the nature of the title so carefully defined, created and vested by its special statutes? It is absurd to contend that it did, especially when the provision of the fourth section for the issuance of the patent states, that upon completion and acceptance of a section of twenty-five consecutive miles of the road "*patents* of lands, *as aforesaid*, shall be issued to said company, *confirming to said company the right and title to said land situated opposite to and coterminus with said completed section* of said road." And that as fast as the additional twenty-five mile sections are completed and accepted "patents shall be issued to said company *conveying* the additional sections of land *as aforesaid*."

2. There is nothing in this language authorizing the officers of the Interior Department to add to or alter the grant made by the third section of the act. It expressly states that the patents are for the purpose of "confirming to said company the right and title to said land

situated opposite to and coterminus with the completed section of said road." And that patents shall be issued *"conveying* the additional sections of land *as aforesaid."* The words "confirming" and "conveying" are used in this section to signify the same thing. There is no reason for believing that Congress intended to convey by the statute title to lands opposite one section of the road and give executive officers authority to convey lands opposite all other sections of the road. It will also be noted that patents, "as aforesaid," are to be issued and that they are for the purpose of *conveying* the additional sections "as aforesaid."

The decisions of this court have settled the construction of this language beyond controversy. In Missouri, Kansas and Pacific R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, Railroad Co. v. Baldwin, 103 U. S. 426, this court said:

> "It is contended that they (the words making a grant *in praesenti*) are qualified and restricted by the provisions of the fourth section, that whenever twenty-five consecutive miles of the road are completed in good substantial and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road.' This provision, it is urged, is

inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title as deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possessions. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. *The previous grant or confirmation is in no respect impaired thereby or its construction affected.* On this point see Langdeau v. Hanes, 21 Wall. 521; Wright v. Roseberry, 121 U. S. 488, 297." (Italics ours.)

This language was quoted and reaffirmed in Desert Salt Co. v. Tarpey, 142 U. S. 240, 247. It being true as the court said, in speaking of the office and effect of the patent that:

"The previous grant (in this case made by the statute) is in no respect impaired thereby or its construction affected," it is difficult to perceive how the patent can be held to grant or convey anything not granted or conveyed by the statute

or how it can be held to grant and convey what the statute had already granted and conveyed. It is entirely clear that the sole office of the patent is to confirm "the right and title" granted by the statute. "And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location, had not been sold, reserved, or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold and silver found therein, and should tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold the reservation of the mineral then undiscovered would be eliminated? Would anyone uphold the reasoning, or the doctrine, which would assist such a conclusion? And can anyone see the difference between the case now before us and the case supposed?"

Barden v. Northern Pac., 154 U. S. 315.

Such is the "right and title to said lands situated opposite to and coterminous with said completed section of said road," which this court has held the patent is intended to confirm.

3. The statute contains no language which can be construed as a specific direction to the officers of the Interior Department to segregate

the mineral from the non-mineral lands, and to mention in the descriptive part of the patent only non-mineral lands. In the absence of such specific provision in the statute, which is special, the only safe and reasonable way to confirm the right and title granted is to carry into the patent the clause excepting and excluding mineral lands. Such is the construction placed upon all railroad land grants for forty years, by all Secretaries of the Interior after administration of them was commenced by the Interior Department; and that this practice has been and is absolutely just to the railroad companies claiming under those grants, and that any other practice would result in giving to the grantees mineral lands of enormous value, which Congress has in these acts said they shall not have, will appear from an exposure of the fallacy of the railroads' favorite argument in trying to induce courts to award them mineral lands under these same grants.

4. We have purposely quoted a second time the language last above taken from the Barden case, because a careful consideration of its import and the absolute correctness of its logic will remove all difficulty this court may encounter in establishing, in this case, a rule which will settle, for all time, with absolute justice, the apparently troublesome question of administering these grants so as to avoid violation of the

acts of Congress which make them, by allowing mineral lands to pass by their operations.

The language last above quoted from the Barden case has been severely but erroneously criticised, not only by the dissenting opinion in that case at page 341, but also by counsel for appellees in this case in the courts below. These criticisms attempt to draw a material distinction between the effect of a conveyance which in terms withholds from its transfer all unknown minerals, mines and quarries in the lands described in it, and a conveyance which in terms withholds from its transfer all of such portions of the lands described in it as contain mineral. The argument and conclusion sought to be deduced from this alleged distinction are that, since in the case of the former type of conveyances, which has been in common use between private individuals for a century, or more, no part of the land itself, but only the unknown minerals, mines and quarries therein are withheld, that therefore, the withholding of them in no way prevents the identification of the property transferred; while, it is claimed, in the latter type of conveyances, all of those portions of the land itself, which contain unknown mineral, are withheld from the transfer, and that therefore the grantees are and always will be unable to identify the lands conveyed to them, unless there shall be designated and fixed a time at which and a

means by which the exclusion of all mineral lands from the grant shall become inoperative as to lands not then known to be mineral.

This alleged distinction is without a difference to sustain it. The argument deduced from it is pure sophistry; and the conclusion which it asserts is asserted to gain for the railroad companies a special privilege, not intended to be given by its grant,—a privilege uniformly denied individuals who have accepted similar grants; a privilege which, if extended to this grantee, will result in vesting in it title in fee to millions of dollars' worth of public lands which the statute forbids to pass by its grant. We say this because:

First. Unknown minerals, mines and quarries are as much a part of the lands described in the deed which withholds them from its transfer as the parcels of unknown mineral lands in the odd sections, within the limits of this grant, are a part of those odd sections.

Second. The private individual who accepts a deed which withholds from its transfer unknown minerals, mines and quarries is no more able to know what portions of the ground described in that deed are withheld from his ownership by its terms than this railroad company is able to know what portions of the odd sections within the limits of its grant are withheld from its ownership by the terms of its grant.

Third. It is as inconvenient for the individual who has accepted such a deed to be uncertain as to what particular portions of the ground described in his deed he owns as it is for the railroad company which has accepted this grant, which withholds from its transfer all mineral lands, to be uncertain as to what particular portions of said odd sections it owns.

Fourth. It would be as convenient, and proportionately as profitable, for the private individual, who has accepted such a deed, to establish, through sophistry, his title to the unknown minerals, mines and quarries withheld from the transfer of the deed to him as it would be for the railroad company, which has accepted this grant, to establish by like means its title to the mineral lands withheld from the transfer of this grant to it.

Fifth. It would be as just to the grantor who has executed and delivered such a deed, if a court should fix a time at which and designate a means by which the provisions of his deed withholding from its transfer unknown minerals, mines and quarries shall become unoperative to such of them as are then unknown as it would be to the United States for this court to fix a time at which and designate a means by which the provisions of this grant withholding from its transfer unknown mineral lands shall become

inoperative as to such of them as are then unknown.

Sixth. The individual who has accepted such a deed can mortgage, sell and convey the identical title which he received of the property described in the deed which he accepted, and individuals are doing this very thing every day all over the United States, and the purchasers know the kind of title they buy and accept, and none of them think of complaining of uncertainty in their titles, and the courts would not grant any relief if complaint were made to them on the ground that such conveyances create uncertainty in land titles. This same railroad company can mortgage, sell and convey the identical title which it received of the property described in the grant and the patent which it has accepted, and it has done so in thousands of instances in the state of California, and the purchasers know the kind of title they buy and accept, and none of them think of complaining of uncertainty of land titles because the records tell them exactly what that title is.

Seventh. The individual who has executed and delivered such a deed can sell and convey to the grantee therein named or to any other person any or all of the property which that deed withholds from its transfer, and no one is injured. The United States can, pursuant to the acts of Congress, dispose of the property which

its grant to this railroad company withholds from its transfer, and no one is injured.

There is not a single consideration which can be urged for holding that the exclusion of unknown mineral lands from this grant shall, at some time and by some means, to be designated by the court, cease to be operative as to lands then unknown to be mineral which cannot be urged, with equal reason and equal force, for holding that the exclusion of unknown minerals, mines or quarries from transfer of deeds shall, at some time and by some means, to be designated by the courts, cease to be operative as to such of them as are then unknown. Nothing, therefore, can be gained by these appellees from any argument based on a supposed uncertainty in land title, nor can it be said that it will be contrary to public policy to continue in force this exclusion of mineral lands from this grant, because:

First. Courts have universally held that it is not contrary to public policy to continue in force such provisions in deeds to individuals. And

Second. The public policy of a state or nation is learned from its laws and not from the sophistry by which a corporation is endeavoring to gain title to a billion dollars' worth of mineral lands, which the act of Congress under which it claims forbids it to take. The simple fact that this excluding clause is *in the statute* makes its

enforcement, for all time, the public policy of the United States, and that policy is not affected by the fact that these appellees regret that it is in the statute, and object to its enforcement as inconvenient and unprofitable to them.

But, consideration of public policy in this matter extends far beyond and above a mere question of land titles. Nothing is so deplorable in the affairs of a republic as lack of its people's confidence in their governmental officers and institutions. Nothing indicates more surely a nation's decay. If, therefore, questions of public policy are to be the basis of the decision in this case, it might be well to inquire what the people of this country will justly conclude if, by and under this granting statute, which provides that all mineral lands, both known and unknown, "*be* and that the same *are hereby excluded* from the operations of this act," the grantee has acquired title to public mineral lands worth millions upon millions of dollars because the statute, which is the law, is not the law.

But, it has been urged in this case in the court below, that because the granting act provides that, in lieu of mineral lands in the odd sections within the primary limits of the grant, "a like quantity of unoccupied, unappropriated, agricultural lands, in odd numbered sections, nearest to the line of said road, and within twenty miles thereof, may be selected as above provided,"

it is necessary to determine what of the primary lands are mineral in order that it may be known for what quantity of lands mineral-lieu selections may be made; and from this it is argued that, if such determination is not made, *by the government*, before patent is issued, but the determination is delayed indefinitely, all of the lands from which such lieu selections could be made will pass from the government, because no title to lieu lands attaches until selection is made, and that it will become impossible to get any lands in lieu of mineral lands excluded from the grant. These considerations are urged to induce the courts to construe the act to oblige the officers of the Interior Department to determine, before issuing the patent, what of the lands are mineral and to issue patents which will pass title to unknown mineral lands. To support this argument cases are cited in which this court has held that patents issued, granting lands under authority of general statutes, raise a presumption that the officers decided before issuing the patent that the land described in it was of the character authorized by such general statutes to be *granted by the patent*. From this appellees have asserted the conclusion that a patent having been issued in this case, the *issuance* of the patent "creates a conclusive presumption" or "is a conclusive adjudication" that all of the land described in the patent is non-mineral, and that

therefore, the Secretary of the Interior had no authority to insert in this patent the clause "yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands' "; and that therefore, this clause must be held void and the other parts of the patent valid, and to raise the presumption that all the lands described in it are non-mineral, and thus pass title to unknown mineral lands.

We have stated this argument at length in order that its fallacies may appear.

First. The granting act expressly puts upon the grantee the burden of selecting the land granted. All mineral lands are by the statute excluded from its grant. "Therefore they were not to be located at all, and if in fact located, they could not pass under the grant."

Barden v. Northern Pacific, *supra,* 316.

Second. If it was possible to determine, before the patent issued, what of the lands were mineral, the grantee could determine that fact and thus avoid the difficulty in locating its lands.

Third. If it was not possible to determine that fact before the patent issued, then there can be no merit in the contention that the government officers should perform the impossible task of then determining what of the lands were min-

eral, since the granting act does not specifically provide that they shall do so.

Fourth. The grantee is forced to admit, as a reason for claiming mineral lands under this grant, that it was impossible to determine, before patent should be issued under it, what of the lands were mineral. This is undoubtedly the reason why Congress, by special act, excluded *in praesenti* all unknown mineral lands from the grant, by a special provision in the statute, instead of depending upon the officers of the Interior Department to perform the impossible task of determining what of the lands were mineral before the time when the company's right to patent would become complete by the completion and acceptance of the road.

Fifth. The purpose of the patent being to confirm the grant made by the statute, and not to make another grant or to change in any particular the grant made by the statute, it was proper that the patent, which evidences the title granted, should contain notice that the grantee acquired no title to any mineral lands.

Sixth. The provisions of the statute which provide that title to lieu lands cannot attach before their selection is a limitation of the grant, intended for the benefit of the public, and should be strictly enforced and liberally construed in favor of the public. The statute informed the grantees that they could acquire no title to min-

eral lands under it. Had they been willing to obey the law by which their grant was made, instead of selecting mineral lands which, as in this case, were covered by mining locations, and depending upon the ingenuity of attorneys to induce courts to construe the statutes so as to give them title to mineral lands, which the statutes forbid, they would not now be before this court arguing their inability to select mineral lieu lands. They chose to risk an opportunity to make lieu selections for the hope of securing, in violation of the statutes, mineral lands a thousand times more valuable than the lands they were entitled to select, and cannot now complain of loss on the uneven chance, which they knowingly accepted, of securing values to which they knew they were not entitled. The sooner these railroad companies understand that these grants mean exactly what they state, and that no title to any mineral lands can pass to them by virtue of the acts or any patent issued under them, the sooner they will cease selecting and trying to acquire mineral lands under them. But so long as they are given hope that, by ingenious arguments, they can induce courts to adopt a strained construction of the statutes to overcome imaginary difficulties, and thus gain title to mineral lands which the statutes say they shall not have, and which are worth millions upon millions of dollars more than the land granted to them, just

so long will they accept this risk of slight loss for the hope of such enormous gain.

5. *Neither the patent issued nor the issuance thereof establishes an adjudication by the officers of the Interior Department that all of the lands described in the patent are non-mineral.*

In the Barden case, *supra*, which is the leading authority upon the exclusion of mineral lands from railroad grants, no patent had issued. There is therefore ample reason for this court to hold, if so disposed, that what was said in that opinion relative to the effect of patents issued under such grants, is *dictum*. The question there presented and determined was whether unknown mineral lands were included in the phrase "all mineral lands," and for that reason excluded from the grant. The determination of the effect of the issuance of a patent under the act was not necessary to the decision of the question presented, except that it was argued in that case by the railroad companies, that, if unknown mineral lands were excluded from the grant made by the statute, *the patent could not pass title to them;* that mineral might be found in the lands years after the patent had been issued and that this circumstance would create uncertainty in the title and render it impossible to identify the land granted,—an argument which, as we have seen, is without merit. What was said in the opinion in the Barden case relative to the effect

of the patent was in reply to that argument. In Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 508, this court said, in speaking of a prior decision:

> "The question in that case was not, for what deficiencies indemnity should be had, but what lands could be taken for deficiencies which exist. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was mere *dictum* and not essential to the decision and therefore not authoritative and binding."

And, as this court said in Barden v. Northern Pacific, *supra*, 322:

> "It is more important that the court should be right upon more elaborate consideration of the case than consistent with previous declarations. Those doctrines will only eventually stand which bear the strictest examination and the *test of experience.*" (Italics ours.)

It would appear from the efforts of the appellees in this case to acquire title to mineral lands to the extent of millions of dollars, under what is said in the Barden case relative to the issuance of patent and the effect thereof, that if their construction of the opinion in that case is correct, its *dictum* will not "bear the strictest examination and the *test of experience.*"

We call attention to this situation, not because it is necessary to alter in any manner the ruling

in the Barden case or any declaration made in the opinion, in order to prevent the railroad company from acquiring titles to mineral lands here in controversy, but because the erroneous construction which appellees seek to place upon that decision is based entirely upon that portion of the opinion which may be properly regarded by this court as *dictum;* and it is not difficult to see how, under that *dictum,* the officers of the Interior Department may erroneously pass to the railroad companies, under these acts, by way of estoppel, title to unknown mineral lands which the act forbids to pass by or under it. That opinion states that, if the officers of the Interior Department *investigate the character of the land* before issuing patent and *decide that it is non-mineral,* and *state in the patent* which they issue *that it is non-mineral,* that such patents will pass title by way of estoppel, to unknown mineral lands described in the patent, and that the title so passed can be thereafter avoided only by direct proceedings brought for that purpose, wherein fraud, imposition or mistake must be alleged and proved. Such is the extent to which that opinion goes in suggesting a method whereby the railroad companies might possibly acquire title to mineral lands. But, as the grant is made by a special statute, which does not specifically authorize any officers to determine the character of the land before patent is issued, and which

must be strictly construed in favor of the public, it is difficult to understand why, in any case, those officers, from whom authority to grant land under the act was designedly and by its express terms withheld, should be empowered to pass, by way of estoppel, title to lands excluded from the operation of the act, and that they should do this by the exercise of the authority not conferred by that special act.

It is stated in that opinion that the duty of determining the character of lands granted by Congress is by law placed upon the officers of the Interior Department. This undoubtedly is true of most general statutes, under which grants are made *by patents;* but will anyone say that the provisions of such general statutes have superceded the provisions of this special act, in their application to the special subject on which they were specially designed to express the will of Congress?

The principle of law which decides this point has been fully explained by this court in Rogers v. United States, 185 U. S. 83, 87, where this court said in part:

> "'The general principle to be applied,' said Bovill, C. j., in Thorpe v. Adams (L. R. 6 C. P. 135), 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject,

or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champenys (30 L. J. N. S. Eq. 782, 2 Johns. & Hem. 31, 54), 'that the legislature having its attention directed to a special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'

"In Black on Interpretation of Laws, 116, the proposition is thus stated:

" 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

" 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the

latter act such a construction, in order that its words shall have any meaning at all.'

"And in Crane v. Reeder, 22 Michigan 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that state, said:

" 'Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone would include the same matter and thus conflict with the special act or provision the special must be taken as intended to constitute an exception to the general act or provision especially when such general and special acts or provisions are contemporaneous as the legislature is not presumed to have intended a conflict.'

"Both the text books and the opinion just quoted cite many supporting authorities.' "

The principle of law declared in that case makes applicable to this case the joint resolution of January 30th, 1865 (13 Stat. 567), which was passed by Congress for the sole purpose of reserving mineral lands from grants to states and corporations to aid in the construction of roads or for other purposes. It reads:

> "That no act passed at the first session of the thirty-eighth Congress, granting lands to states or corporations, to aid in the construction of roads, or for other purposes, or to extend the time of grant theretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved, exclusively to the United States, unless otherwise specially provided in the act or acts making the grant."

The reservation of mineral lands by this resolution is not confined to the lands affected by the grants specified as made by the thirty-eighth Congress. Its language is, "mineral lands, which *in all cases* shall be, *and are*, reserved * * *." This resolution has never been repealed, it is not inconsistent with the provisions of this granting act, its reservation is *in praesenti* and necessarily includes unknown mineral lands and it forbids any construction of this grant which will include mineral lands in its conveyance.

It is entirely clear that the powers, duties and authority given the officers for the administration of general statutes authorizing them *to grant lands by patents* have no application in their administration of this special statute, by which Congress did not leave to those officers the duty of granting land and excluding mineral land from the grant, but did itself exclude them by the granting statute which made the grant. If those officers have assumed to decide, for all time, the character of the land in odd sections before issuing patent, they have assumed an authority not conferred upon them by that statute, which is the only law applicable, and hence cannot, in the exercise of it, estop the government or those claiming through or under it.

But whatever the court may hold as to the possibility of those officers estopping the government by an erroneous decision as to the char-

acter of the land before patent is issued, to say that they can do so is one assertion; to say that the law of this grant compells them to attempt the admittedly impossible task of then determining the character of the land and by necessary failure in that task to work such estoppel, is quite another assertion; and to say that they have attempted, in this case, to decide the character of the land before issuance of patent, and made an erroneous decision in that regard, is still another and very different assertion.

In noting the way in which such estoppel could be worked, under the *dictum* in the Barden case, it will be advantageous to note also the supposed difficulty which confronted this court in deciding that case, and divided it, because what was there said relative to the issuance of patent and the conclusiveness of it as to the character of the land was stated in reply to an argument which presented that supposed difficulty, which we have shown to be without merit and foundation.

When that case came before the court it was irrevocably committed to the following propositions in construction of railroad land grants:

1. That the railroad grants were grants *in praesenti,* and that they passed a present title as of the date of the grant to all the land granted by them, upon the definite location of the line of the road. Such had been the uniform rulings of this court in many cases.

2. That a patent issued under the provisions of a railroad grant neither grants nor conveys anything, but is only convenient evidence of the grant made by the special statute.

3. That in case of grants made by patents issued under general statutes, a decision by the officers of the Interior Department of all questions of fact necessary to entitle the applicant to the land, was necessarily prerequisite to the making of the grant *by the issuance of the patent*, and that, therefore, the grant having been made, the patent, which was a perfect record of the grant, precluded any collateral inquiry as to the character of the lands described in it.

The court was confronted with these previous rulings in considering the exclusion *in praesenti* of all mineral lands from the operations of the granting act, and this excluding clause of the statute was direct, positive and unqualified. The difficulty was to give effect to this exclusion clause, in accordance with the plain intent of the statute, and not overrule the cases which held that the statute passed a present title, and that the patent in no way changed the grant made by the statute.

The minority of the court sought to reconcile the apparent conflict by conceding that only lands known at the date of the grant to be mineral were excluded therefrom. Their reason for this was *that the patent cannot change the grant*

and that, if lands not known to be mineral, at the time of the grant could be claimed by citizens when they afterwards turned out to be mineral, then the question of the character of the land could never be settled, and the title would always be uncertain.

Mr. Justice Brewer stated tersely, in his dissenting opinion, at page 335 *et seq.*, the difficulty which confronted the court in Barden v. Northern Pacific, *supra,* when he said:

> "But it is said that Congress never meant that this vast mineral wealth should pass to this corporation, and that the individual must contract with that corporation for the purchase of any mine, and yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared, *in effect,* that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. *If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto.*" (Italics ours.)

That is both logic and law.

On page 226 of the opinion in the Barden case, the court says:

> "The earnest contention of the counsel for the plaintiff arises principally, we think, from the unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of

> the government is not limited to *known* mineral lands, the title, it is said, may be defeated years after the land has passed into the hands of the grantee and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that title to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public."

What "uncertainty in the titles of the country" would be created, if this court should simply hold in this case, that the statute is the railroad company's grant, its only possible source of title, that the patent can grant nothing, that the statute excludes all mineral land, both known and unknown, and that they are therefore excluded, and that no title to any of them can pass in any manner whatsoever, because the statute, which is the law, forbids it and that this court must construe the statute to mean just what it says and nothing else? No uncertainty whatsoever could be created in land titles by such a ruling. It is a right of universal practice for grantors to withhold from their conveyances unknown mineral in lands and sufficient of the ground where the minerals may be found to enable them to develop the land and take out the mineral advantageously. This very railroad company is doing this same thing by deed every day in regard to

the lands claimed by it under this identical grant. If it prevails in its present contention as to the construction of the grant, the people, for whose benefit the unknown minerals in the land and what Congress deemed sufficient land to work them advantageously, were excluded from the grant, will soon own by purchase, the non-mineral lands and the railroad company will own the unknown mineral in the land and what it deems sufficient of the land to work it advantageously—all contrary to the express provisions of the statute,—which would be a fine compliment to the shrewdness of appellee's counsel, but a sad reflection upon the wisdom of our courts. As shown on page .... of this brief, there is absolutely no foundation for this claim of uncertainties in titles unless it be conceded that the railroad company is privileged to have applied to grants to it a different rule of law than that applied to the same grants to private individuals.

But in reply to the argument which created this supposed difficulty of uncertainty in the titles of the country, the opinion in the Barden case proceeds to point out a way of avoiding this supposed uncertainty, which the railroad company then complained of, for the purpose of acquiring title to mineral lands, which were excluded from its grant and the same uncertainty which it is now daily creating in the titles of the

same land for the sole purpose of keeping those same mineral lands which its grant states it can never own. The method designated by the opinion will appear from the following excerpts from it:

> "The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of the public lands of the United States and the adjustment of private claims to them under the legislation of Congress. It can hear contests and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear the evidence upon and determine the character of the lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law specifying that the lands are of the character for which patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to plaintiff provides for the issue of patent to the grantees for the lands claimed and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance." (Pp. 326-327.)
>
> "The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it

> in the instruments transferring the title of government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees were performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by the officers of the Land Department, charged with its preparation and issue, that the land is non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the Department, would be conclusive in subsequent proceedings respecting the title." (Pp. 330-331.)

The above quotations undoubtedly state the law relative to grants made by patent under authority of general statutes which authorize the officers of the Interior Department to grant lands; but to say that it is the law which controls this grant which Congress itself made *in praesenti* by special statute direct to the grantee is quite another matter, because:

First. "The law" which defines and controls this grant does not "place under the supervision" of the officers of the Interior Department "the control of all matters affecting the disposition of the public lands" granted by this act. The

statute itself expressly excludes these mineral lands from the grant and thereby removes from the supervision of those officers the control of the matter of excluding them from the grant.

Second. The patent provided for in the statute does not *convey* the land which had been already conveyed by the statute, neither can it convey any lands not conveyed by the statute, because the officers who issue it have no authority of law to convey, *under this statute,* any lands not granted by the statute; hence, the patent is in no sense a "conveyance" but its office is to confirm the right and title granted by the statute. (See *ante,* p. . . .)

Third. Under this special statute "the duty of determining the characer of the land granted by Congress and stating it in the instruments transferring the title of the government to the grantee" *does not* repose in the officers of the Land Department because:

(a) The special statute does not place that duty upon those officers. (*Ante,* p. . . .)

(b) "The instrument transferring the title of the government to the grantees," can be none other than the statute, because the statute itself transfers the title of the government to the grantee, as held by this court in a multitude of cases, and no one will assert or pretend that those officers have any right or power to change that statute in any regard.

These observations indicate some of the inconsistencies into which these statements of the opinion in the Barden case, which the court is at liberty to regard as *dictum,* may lead the court. There is but one way to avoid these inconsistencies and that it to hold that the statute which is the law, *has excluded* all mineral lands, both known and unknown, from the grant, and that they are, therefore, excluded for all time, unless Congress sees fit, in its wisdom, to change the statute. Such is the rule universally applied to similar grants between individuals. Why should it not apply to this railroad company, especially since its conveyance is the *law of its grant,* and not dependent for its validity, according to its import, upon rules of the common law or those derived from other statutes.

But even if the court wishes to consider itself bound by these statements in the opinion of the Barden case, yet, giving full force to those statements as the law of the state, the title to the lands here in controversy has never passed to the railroad company, because:

First. Under those statements three things are absolutely necessary to vest in the railroad company title to mineral lands under the grant:

(a) An examination by the officers of the department into the character of the land described in the patent;

(b) A finding by those officers, after such examination, that the land is non-mineral.

(c) A statement in the patent issued that the lands described therein are non-mineral.

And the court says:

> "Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff." (P. 330.)

And, that such patent, showing a decision by the officers that the land described in it is non-mineral, "would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title." (P. 331.)

But, the obvious answer to an attempt to apply such estoppel in this case is that it is alleged in the cross-bill and admitted by the demurrer and stated in the certificate of the judges certifying this case to this court:

(a) That the land in controversy is mineral land;

(b) That the officers of the department never made any investigation or examination into the mineral or non-mineral character of the land before issuing the patent;

(c) That those officers never decided that said land was non-mineral;

(d) That the patent issued contains no statement that said land is non-mineral;

(e) That since said patent issued those officers have examined said land and classified it all of record as mineral land;

(f) That the patent issued contains a clause in appropriate language purporting to exclude all mineral lands from the grant.

It is therefore admitted in this case that the patent does not "comply with the act of Congress in which the grant before us was made" to the Southern Pacific Railroad Company, and it cannot estop anyone who claims the land under the mining laws.

The court also said in the Barden case, p. 331:

> "The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, *without excepting mineral lands,* until it has had an opportunity to have the country, or that part of it for which patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

It is admitted in this case that no examination whatever was actually made of this land to determine its character before patent issued, and that the officers did, in issuing the patent, except mineral land by inserting the mineral exception clause in the patent. Therefore, under the above

language of the court, that exception is good and kept in the United States the paramount title to these mineral lands. If this last quotation is *dictum* the same is true of all that part of the opinion which speaks of the effect of issuing patent.

It is not difficult to understand why the court stated so carefully that to estop the government there must be a decision of the officers that the land was non-mineral and a statement of that decision in the patent. The necessity of this arises from the nature and functions of the officers of the Interior Department when it acts judicially in determining the character of lands under these grants and issuing patents for them. This leads to another proposition which is fatal to appellee's contention in this case, viz.:

THE APPELLEES CONFESSEDLY SEEK TO ESTABLISH, BY VIRTUE OF AN ERRONEOUS DECISION BY PUBLIC OFFICERS, THEIR TITLE TO PROPERTY WHICH CONGRESS INTENDED AND SPECIALLY DECLARED BY STATUTE THAT THEY SHOULD NOT HAVE, AND THEY MUST THEREFORE SHOW AFFIRMATIVELY FROM THE RECORD THAT SUCH ERRONEOUS DECISION WAS MADE.

In considering this proposition and the methods by which the making of such erroneous decision under the *dictum* of the Barden case might be established, it should be remembered that the

officers of the Land Department, acting under the direction of the Secretary of the Interior, constitute a special tribunal. When considered as such special tribunal it is inferior in the technical sense that it is not a court of general jurisdiction having full power to decide conclusively all questions of jurisdiction and all other questions of law arising in the course of its proceedings, although it acts judicially.

Smelting Co. v. Kemp, 104 U. S. 636-640;
Steel v. Smelting Co., 106 U. S. 447-450;
Barden v. Northern Pac., 154 U. S. 288-327-328.

In Grignons v. Astor, 43 U. S. 319, the court had under direct consideration the nature of inferior and superior tribunals, and the nature and conclusiveness of their judgments. In that case it was necessary for the court to examine and state the distinction between inferior courts of limited jurisdiction and superior courts of general jurisdiction, and the nature and effect of their respective judgments. At pages 340-41 the court speaking of the effect of judgments of superior and inferior courts said:

> "The granting the license to sell is an adjudication upon all the acts necessary to give jurisdiction and whether they exist or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom

it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree it can be impeached only by fraud in the party who obtains it. 6 Peters 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provision of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts in the technical sense of the term, because an appeal lies from their decision. That applies to 'courts of special and limited jurisdiction which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction'; that of the courts of the United States is limited and special and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Peters 205. They have powers to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless reversed on error or appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and

whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; *every requisite for either must appear on the face of their proceedings, or they are nullities.*"

It was this principle of law governing the proceedings of special inferior tribunals of limited jurisdiction which Justice Field had in mind when in the Barden case, *supra,* in speaking of what a patent issued under a railroad grant should contain, said:

"The fact remains that under the law the duty of determining the character of the lands granted by Congress, *and stating it in instruments transferring the title of the government* to the grantees, reposes in the officers of the Land Department. Until such a patent is issued, defining the character of the land granted and showing that it is non-mineral, *it will not comply with the act* of Congress in which the grant before us was made to plaintiff." (Italics ours.)

The officers of the Land Department have no jurisdiction, according to the *dictum* of that opinion, to issue a patent under a railroad land grant without inserting in such patent a clause excepting all mineral lands, unless they have previously decided that all the lands described in the patent are non-mineral. A decision by those officers that the land is non-mineral is necessary to their jurisdiction to issue patent which will evidence title to it in the grantee.

It is because the court recognizes that the Land Department, in deciding questions arising in its proceedings on the disposition of public lands, acts as a special *technically inferior* tribunal having limited exclusive jurisdiction, that it insists that the facts necessary to the passing of the title under the grant must appear upon the face of the patent itself. The wisdom and reasonableness of this rule will at once appear when we reflect that the findings of fact by the department are final and conclusive, because their jurisdiction to determine questions of fact is exclusive. They cannot, except for fraud, be controverted in any other tribunal having either original or appellate jurisdiction. If the law did not require the record of the proceedings of such inferior tribunal to show both jurisdiction and its lawful exercise by requiring every fact requisite for either to appear on the face of the proceedings, how could a court ever ascertain

whether such inferior tribunal having exclusive jurisdiction to decide questions of fact had misapplied or misconstrued the law under and in accordance with which it claimed to act?

The rule obtains that their decisions of questions of fact, based upon evidence, are final and conclusive, and if the record does not show what facts have been established and what have not been established, it would show nothing upon which any court could apply the law.

It is a well established rule that the erroneous decisions of questions of law by the departments are not binding on courts. Decatur v. Paulding, 14 Pet. 479. And in order to know whether or not the department has decided correctly or incorrectly any question of law arising in its proceedings, a court must know how it decided the questions of fact upon which the question of law arose. If the decision of such questions of fact do not appear upon the record it would be impossible to know how the law was construed or applied; so it has been settled beyond controversy that the records of the proceedings of technically inferior tribunals must show not only the facts upon which they presume to exercise their jurisdiction, but also the facts which will show whether or not they have decided correctly, in the exercise of that jurisdiction, the questions of law arising upon those facts.

The appellees are therefore confined to the

patent and to the records of the proceedings wherein it was issued to show affirmatively that the department erroneously found that the land was non-mineral, which records show affirmatively that no such decision was ever made.

The defendants claim, and the court below held, that the patent pleaded in this suit is in effect a judgment or decree of the Interior Department acting as a tribunal or court. We are willing to concede this contention because in such case the patent must be considered the decree or judgment either of a technically superior court of general jurisdiction or of a technically inferior court of special limited jurisdiction. If it be considered as a judgment or decree of a court of the former class, then:

> "If there is error in it, of the most palpable kind, if the court which rendered it have in the exercise of jurisdiction disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchases is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law."
>
> Grignon's Lessee v. Astor, 43 U. S. 340.

It is clear under this doctrine that even if the department be regarded as such superior tribunal of general jurisdiction, it having issued a patent which purports not to convey such of

the lands therein described as are non-mineral, *such patent remaining* and no appeal having been taken from it, the patent must be held valid according to its terms and import, which are due to the construction placed upon the statute by the tribunal.

On the other hand if the patent be considered as a judgment or decree of a court of the latter class, then every fact necessary to confer jurisdiction and also every fact necessary to show the correctness of the judgment or patent must appear of record in the proceedings wherein the patent was issued, or the patent is a nullity; and, not only is there no record that the department decided that this land was non-mineral, but both the patent and the record of the proceedings in which it was issued bear unmistakable evidence that no such decision was ever made. The bill alleges and the demurrer admits that the department never decided that the land was non-mineral, which decision was necessary to the attachment of the grant made by the statute; it was necessary to identify the lands as those of which title passed by the statute, and it not appearing of record in the proceedings wherein the patent was issued, the judgment or patent which concluded those proceedings is either a nullity or the exception of mineral lands is effective, because the statute confers no authority for the inclusion of mineral lands in the patent. The

patent states upon its face that neither the act of Congress under which it was issued, nor the patent itself taken in connection with the statute conveys any lands which are in fact mineral; so it makes no difference which horn of the dilemma the defendants take. A simple application of the law to the facts pleaded and admitted by the demurrer demonstrates that the defendants have no title to the lands in controversy in this suit. In other words, if the patent be considered as a final judgment of a superior tribunal having general jurisdiction it is valid as a whole and cannot be disputed. If considered as a final judgment of a special inferior tribunal of limited jurisdiction, *there appearing in the proceedings no finding that the land was non-mineral,* the tribunal had no authority in law to issue any patent thereof unless it had authority to issue a patent which would not pass title to any of the lands which might thereafter be found to be mineral. Even if the department had no authority to issue a patent containing this mineral exception clause, it is still true, *that it did not issue one which does not contain that clause,* and the patent recites no determination of the non-mineral character of the land, which determination was necessary to enable a court to determine, as a matter of law, whether it was within the power of the department upon facts found to issue a different patent, viz.: one pur-

porting to pass an absolute title to all the land described in the patent. Hence there was no foundation for the issue of such patent.

The appellees cannot be permitted in one breath to claim that the Land Department in issuing the patent, acted in the capacity of a superior court of general exclusive jurisdiction, and that its patent is therefore conclusive and final, and thus establish the validity of the patent or final decree, and then in the next breath to claim that the same department, in the same proceedings, acted in the capacity of a special inferior tribunal of limited jurisdiction, and that therefore they can, in this proceedings, impeach the validity of those parts of the patent or decree which prevents their title from attaching to mineral land, which both the statute and the patent state never passed to them. The rule governing these matters is that this patent is valid and effective according to its terms and import or is a nullity. Speaking of the effect of a judgment sale and confirmation on attachment by the Court of Common Pleas of Ohio, which was a superior court of general jurisdiction, the court said, in Voorhees v. the Bank of the U. S., 10 Peter 473:

> "A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties the subject matter with au-

> thority to use the process it has issued; it must remain the only test of the respective rights of the parties to it, p. 474. * * * The line which separates error in judgment from the usurpation of power is definite; and is precisely that which denoted the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purported to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error, p. 475."

Again, in Wilcox v. Jackson, 13 Pet. 498, 511, the court, in speaking of the nature and effect of the final decisions of the tribunal, said:

> "Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable would render that inquiry wholly unavailing. It is this—that the acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption—that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the

> judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of Elliott *et al.* v. Peirsol *et al.*, 1 Peters 340, in these words: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.' "

Nothing could be clearer from the rulings of the court in these cases than that the patent pleaded in this suit must be held valid and effective according to its import, however erroneous may have been the construction of the law which induced the officers to issue it, unless it was issued without authority; that is, unless the officers have no jurisdiction or power to issue a patent which would evidence title to such of the land described in it as was non-mineral, and not to such of it as was mineral. It is clear from the patent itself that such is its import and, if the officers had no authority to make or issue such a patent, it is clearly a nullity; under these decisions there is no middle ground.

The Land Department acts as a special inferior tribunal in matters pertaining to the dis-

position of the public lands. Its jurisdiction to determine questions of fact in those proceedings is exclusive and its findings of fact made therein are therefore, when based upon evidence, final and conclusive and binding upon the courts of the country: *Barden v. Northern Pacific Ry. Co.*, 154 U. S. 288; but while its findings on questions of law are entitled to great respect by the courts they are not binding upon them, if for no other reason than that the Interior Department is a branch of the Executive Department of the Government, and therefore cannot, in construing statutes, exercise judicial powers to an extent which will deprive the courts of power to declare its construction of laws erroneous whenever it is erroneous. There is no law by which an appeal may be taken from the decision of a question of law by the head of the Interior Department to any court which is a part of the judicial branch of our system of government. The cases wherein courts have held erroneous, in collateral proceedings, the construction of laws and their application to facts found by the executive department are too numerous to require citation of authorities to show the existence of the power, which is derived directly from the very nature of our system of government, under the fundamental principles of which every person has a right to his day in court, and need not be dependent for his rights

upon an executive officer's notions of what the law is. Ours is a government of law, and not of men.

Now, in the case at bar, the officers of the Interior Department have construed the granting statute and the joint resolution to make it their duty to issue to the railroad company patents for the lands answering the record description set forth in the grant "expressly saving and reserving," "all mineral lands," by making the patent express that the United States had granted and did grant such of the lands described in the patent as are non-mineral, and did not, either by the statute or the patent, grant such of them as are mineral. Such is plainly the meaning of the language of the patent. Whether it is effective evidence of title in the grantee to these mineral lands raises the following questions of law:

"Did the facts found by the department before the patent was issued, warrant the issuance of the patent issued, or did those facts warrant the issuance of a patent stating that the granting statute and the patent passed an unqualified title to the grantee of all the lands described in the patent?

(A) If the department had made no decision as to the mineral or non-mineral character of any of the lands described in the patent.

(B) If the department had decided that all

of the lands described in the patent were non-mineral.

(C) If the department had decided that all of the lands described in the patent were mineral, but were not known at the date of the grant, to be mineral.

(D) If the department had decided, or had reason to believe that some of the lands described in the patent were mineral, and that some of them were non-mineral.

The court may have no difficulty in answering correctly all of these hypothetical questions, but that is not the point. The point is, that the court cannot tell whether the officers of the executive department answered any or all of these questions of law correctly without first determining accurately what, if anything, the department had previously determined regarding the mineral or non-mineral character of each and every parcel of land described in the patent. The court cannot, therefore, determine whether the executive officers construed and applied the law correctly or erroneously or acted within or tried to transcend the powers conferred upon them by law, unless the records of the departmental proceedings wherein the patent was issued show affirmatively what questions of fact were decided, and what the decisions of them were.

It follows, necessary, from these observations that the patent is a nullity or is valid according

to its terms and import. In either case the title to these mineral lands could not pass to the railroad company.

6. *Neither the patent issued nor the issuance thereof creates a presumption that the lands therein described are non-mineral.*

The defendants attempt to avoid this difficulty of showing from the record the adjudication of questions of facts necessary to establish their title by way of estoppel by contending that the *issuance* of the patent creates a conclusive presumption of law, that the department adjudged all the lands described in the patent to be non-mineral before issuing the patent, because such an adjudication was a necessary pre-requisite to the lawful issuance thereof. The Circuit Court allowed that contention, and held that, therefore, the mineral exception clause in the patent was inserted without authority of law and was inoperative, void and of no effect to save and reserve to the United States any mineral lands described in the patent.

Let us see to what absurdities this doctrine will lead. It is based upon the argument that neither the record of the proceedings wherein the patent was issued, nor the patent itself shows affirmatively, that the land was adjudged mineral, or that it was adjudged non-mineral, and that therefore it must be conclusively presumed:

1. That the officers would not have included the lands in controversy in this suit in the patent if they had known that they were mineral; and,

2. That if they did not know that these lands were mineral, it must be conclusively presumed that they decided that they were non-mineral.

This doctrine and the ruling which allowed it, if permitted to stand, would inevitably confer upon officers of the executive department of the Government, sitting as as pecial inferior tribunal with limited jurisdiction, all of the powers of courts of both general and final appellate jurisdiction on all questions of law arising in the course of their proceedings, provided only that they unlawfully neglect and refuse to set forth, in the records or their proceedings, the facts upon which they apply the law. In reply to any complaint of their erroneous construction, or even wicked disregard of the law, it would be sufficient answer to say:

The record does not show the findings of fact upon which they decided the questions of law which are claimed to be erroneous; it cannot be determined that the decision was erroneous, or that it was correct; the departmental decision of the questions of fact upon which the law was applied, is final, whatever it was; it must be conclusively presumed that the construction and application of the law, whatever they were, to those facts, were correct; there is no provision of law

whereby an appeal on any question of law may be taken to any court which is part of our judicial system. There is no record upon which an appeal may be taken, or which will enable any court, in any separate proceedings, to determine, whether or not, the department misconstrued, or misapplied the law.

Thus would the executive department of the government be able to usurp and exclusively exercise judicial function in construing laws, contrary to the constitution and laws as construed by the courts. The only condition precedent to usurpation of this power, would be that the executive officers disobey the law and not keep records of their proceedings, or be presumed not to have kept them, while the fact that the law provides that they shall keep such records, and that the fact that they do keep them, (because the law requires it and because being a special inferior tribunal of limited jurisdiction, the making of complete records is necessary to the validity of their final judgments), raise the conclusive presumption that, if they had decided that the land was non-mineral, there would be a record of that decision, and that if no such record exists, no such decision was ever made.

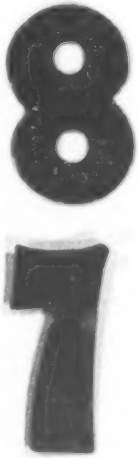
If the contention of the appellees and the ruling of the circuit court in accordance therewith be permitted to stand, the fact, established by presumption, that this special inferior tribunal, has

disregarded the law in that it made no record of its decision of a question of fact, the making of which was necessary to give it jurisdiction and to enable the courts to determine whether its construction of the law was correct or erroneous, becomes the basis of another conclusive presumption that the same tribunal, in the same proceedings, construed and applied the law correctly. Then, as if further to demonstrate the inconsistency of these presumptions, the appellees claim that this same tribunal, in the same proceedings, erroneously decided that the land was non-mineral, and erroneously construed the law to authorize them to insert in the patent a clause designed and intended to save and reserve to the United States mineral lands which it had previously in same proceedings decided did not exist.

All of these inconsistent and contradictory results which would necessarily follow from this alleged conclusive presumption which defendants seek to invoke, are due to an erroneous assumption that decisions of questions of law by this special, technically inferior tribunal, composed of officers of the executive department, and which forms no part of the judicial branch of our system of government, and from which there is no appeal to any court which does form a part of the judicial branch of that system, are final and conclusive, while the law is that its decision of questions of fact are, when based upon evidence,

final and conclusive, except in cases of fraud, but that its decisions of questions of law are not final, because it has no final or exclusive jurisdiction to decide questions of law, and no appeal lies from it to any *court* to correct its errors in law.

All these difficulties disappear with the application of the rule of law that the executive officers of the government, acting as a special tribunal,—inferior in the technical sense,—must state in the record of their proceedings wherein the patent was issued, and in the patent itself, their decision as to the mineral or non-mineral character of the land, in order that the courts may be enabled to determine whether, under the facts found by the department there was any authority of law for the issuance of the patent issued, and also whether it had authority, upon facts decided, to issue some other and different patent which it did not issue. Every finding of fact necessary to show authority of law for the issuance of the patent issued, must appear on the face of the records of the proceedings, or they are nullities. Therefore, if the record does not show affirmatively that the department decided that all of the lands described in the patent were mineral, or that they were non-mineral, it certainly cannot on the theory that this inferior tribunal must be conclusively presumed to decide correctly the question of the character of the land, which is admitted to be mineral, be conclusively presumed,



that they decided erroneously that they are non-mineral.

A decision that the land was non-mineral could not be a necessary pre-requisite to the issuance of the patent issued, which purports not to pass title to such of the lands as are mineral; therefore *the patent issued* can raise no presumption that such decision was made. The existence of a patent purporting to pass an absolute title to all the lands described in it might raise such a presumption (and it might not), but no such patent exists in this case and therefore no such presumption arises or exists.

He who alleges an erroneous decision by any tribunal must show it, and in this case, because of the nature of the tribunal which issued the patent and its limited powers, such decision must be shown, if at all, from the record of the proceedings wherein the error is alleged to have been committed. It must not be forgotten that presumptions, and especially conclusive presumptions of law in cases like this one are indulged by courts to uphold the final acts of public officials, and therefore necessarily arise from the *nature and import of the final act done.* The nature and import of the final act determines what must be presumed and the presumption never determines the nature or import of the final act and alters the record. A presumption is nothing more nor less than a logical inference deducible

from facts and circumstances known—in this case the existence of a patent. It is inconsistent with reason to say that such inference which owes its existence to the patent can change that patent so that it will create, by way of another inference, another presumption inconsistent with the existing patent from which the original inference arises.

The appellees have attempted in this case to distinguish between the effect of the patent and the effect of the act of issuing it, and to claim that the *issuance* of it raised a conclusive presumption that the land described in it is non-mineral. The obvious answer to that suggestion is that the patent is a perfect record of the act of issuing it and imports absolute verity of the nature and purpose of that act.

This very case affords a fine illustration of the fallacy of the appellees' contention that the patent issued creates a conclusive presumption that all the lands therein described are non-mineral, or, in another form—that the issuance of the patent was a complete adjudication that all the land described in it is non-mineral. The patent purports to pass title of such of the lands therein described as are non-mineral and not to pass title to such of them as are mineral. By what process of logic or reason can it be inferred that the officers who prepared such a patent had previously decided that all the lands described in it were non-

mineral? It is reasonable or logical to *presume* that they meant to exclude from the effect of the patent mineral lands which they had decided did not exist? The fact that they undertook to exclude mineral lands from the effect of the patent is not only evidence but it amounts to proof that they were satisfied that some of the lands described in the patent were mineral. The fallacy of the appellees' argument on this point is apparent in this: They assume that the officers who issued the patent had no authority in law to issue the patent which they did issue, and that they ought to have issued another and different kind of patent, viz.: One purporting to pass an absolute title to all the lands described in the patent issued. Then from such patent, which they claim ought to have been but was not issued, they deduce their alleged conclusive presumption and then apply it to another kind of patent actually issued for the purpose of changing, by some unknown species of legal fiction, the patent issued in such manner that it will read as they want it to read and so raise the conclusive presumption which is claimed to work this change of the record. The difficulty is that no patent which could give rise to the alleged presumption was ever made or issued for the lands in controversy, and therefor no such presumption concerning these lands ever existed. The validity of the patent issued does not require a previous decision by

the officers that the land is non-mineral. Therefore it raises no presumption that such decision was made.

We do not contend that if the department has decided in a contest that all the lands described in the patent are non-mineral, we have a right to show in this case that such decision was erroneous, but we do contend:

1. That neither the patent nor the record of the proceedings wherein it was issued shows that such decision was made, and that it can be shown from no other source.

2. That both the record and the patent shows affirmatively that such decision was not made.

3. That such decision cannot be presumed to have been made because the record leaves no room for such presumption.

The officers of the Interior Department had authority in law to issue the patent pleaded in this cause, which purports to pass to the railroad company such of the lands therein described as are non-mineral and not to pass title to it of such of them as are mineral.

The views of the Circuit Court, as to the effect of the saving clause in the patent, are tersely stated in its opinion as follows:

> "There is absolutely nothing in the saving clause of the joint resolution either requiring or authorizing the patent thereby directed to be issued for the granted lands to contain

those conditions or restrictions or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainant's counsel is correct that by the joint resolution of June 28th, 1870, congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title, and which were not free from preemption or other claims or rights at the time the line of the grantee's road was designated by the plat thereof, filed in the office of the commissioner of the general land office. There is no escape from this conclusion, for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none."

In the first place there is a manifest difference between *authorizing* these conditions and restrictions to be saved and reserved in the issuing of the patent, and *authorizing and requiring* them to be saved and reversed by any particular means or method in the issuing of the patent.

The inherent powers of the executive department are ample authority under these acts for the issuance of the patent issued thereunder. Neither the act or the joint resolution directs the secretary of the interior or any other government official to save and reserve the restrictions of the grant to mineral lands by determining prior to the issuance of the patent what of the odd numbered sections within the limits of the grant are mineral and what are non-mineral, and to include in the patent only non-mineral lands; nor does either the act or the joint resolution specify any other method or means by which these restrictions and conditions are to be saved or reserved in the issuing of the patent; but they clearly make it the duty of the secretary of the interior "to cause patents to be issued to said company for the sections of land coterminous to each constructed section of land reported on as aforesaid to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

This language is a clear direction to the secretary of the interior to cause to be issued patents expressly saving and reserving the specific conditions and restrictions contained in the third section of said act; and under it the patent must express, *in some way*, the saving and reserving of

all these conditions and restrictions which are, in respect to the means by which one could determine to what lands they apply, of two classes:

1. The records of the land office required by law to be kept would reveal of what of the lands the United States had full title, and what of the lands were not reserved, sold, granted or otherwise appropriated, and what of the lands were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed.

2. The records of the land office would not show what of the lands within the limits of the grant were mineral and what were non-mineral, for the simple reason that there had been no record of all mineral lands made, nor was there any provision of law for the making of such a record, and the mineral or non-mineral character of the land within the limits of the grant could be determined only after extensive exploration and examination of all of the lands.

The officers of the interior department expressed, in the patent, the savings of the restrictions and conditions of the former class by examining the records of the land office and including in the description of the patent only lands to which these conditions and restrictions did not apply, and also by distinct recitals in the patent showing that none of the lands therein described were subject to claims or rights which brought

them within any conditions or restrictions of the former class.

The officers could not determine from the records of the land office what of the lands were non-mineral; they made no examination of the land themselves with a view to determining their mineral or non-mineral character, but sought to save and reserve the limitation and restriction of the grant to non-mineral lands by issuing a patent which would pass title to such of the lands as were non-mineral and would not pass title to such of them as were mineral.

The means by which, and the manner in which those officers should have saved and reserved these conditions and restrictions of the grant were, in the absence of specific directions prescribed by law, matters entirely within their discretion, and it is not necessary for them to show affirmative statutory authority for everything they do in the discharge of their duties, much less for the methods or means by which they accomplish the results required by the acts of congress. This was settled as early as 1833 in United States v. Macdaniel, 7 Pet. 1.

McDaniel had been a clerk in the navy department at a salary of $1400 per year for 15 years, and had also acted as agent of the government in paying pensions and had been allowed commissions on his pension disbursements as such agent. Under a new construction of the statute by the

department he was not entitled to these commissions and the United States sued him to recover $988.96 which he did not owe if these commissions were allowed to him. This court held that the custom or usage which had obtained in the department under the former construction of the statute was binding as to past transactions and that McDaniel was entitled to the commissions and that the United States could not recover them from him. In that case the court said:

> "A practical knowledge of the action of one of the great departments of the government must convince every person that the head of the department, in the distribution of duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his power by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of the government would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the government; hence,, of necessity, usages have been established in every department of the government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits,

> and no changes of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction of it, and must be considered binding on past transactions."

To the same effect are:

United States v. Brown, 92 U. S. 763;
United States v. Philbrick, 120 U. S. 53, 58-59;
Robertson v. Downey, 127 U. S. 607, 613;
Hastings etc. R. R. Co. v. Whitney, 132 U. S. 357, 366;
Pennoyer v. Connaughy, 140 U. S. 1, 23.

It is true that in December, 1904, ten years after the patent in this case was issued, a decision was made by the Interior Department, upon the *ex parte* application of the Northern Pacific Railroad Company, that there is no authority of law for the insertion of the mineral exception clause in the patent. (32 L. D. 342.) But it will be remembered that a commission was appointed under Act of Congress to examine the lands under that grant and determine their character. (28 Stat. 683.)

That ruling was applied to patents issued under all railroad land acts, but it is entirely inconsistent with the authorities cited to sustain it, and it bears internal evidence of lack of the discrimination and diligence which an officer of the government ought always to exercise in matters

wherein such enormous interests of the United States are involved. But, that decision could not affect the force and effect of the clause as it was inserted in the patents prior to that time under a construction of the statute which was acquiesced in by the railroad company.

The cross-bill alleges and the demurrer admits that for the forty years immediately preceding the issuance of this patent it had been the uniform custom of the Interior Department to issue, under all railroad land grants, patents containing the mineral exception clause found in this patent, which was issued in conformity to that custom. This custom arose and obtained during all that time under the same construction of these grants by many successive Secretaries of the Interior, and none of them doubted that these patents were effective to save the mineral land therein described to the United States. Hundreds of thousands of acres of the most valuable mineral lands in the western states have been included in the descriptions of such patents issued under these grants to railroad companies which *have accepted them, without protest, and with full knowledge of their nature and import, and with full knowledge of the fact that the reason why the patent purports to except mineral lands is that there had been no prior examination and determination of the character of the land, and that the government officials relied upon the import of*

the patent prepared and issued under this construction of the statute to save mineral lands to the United States.

Now, the question is, whether the action of the department in undertaking to save and reserve the limitation of the grant to non-mineral lands, by incorporating in the patent a saving clause, shall be binding and effective as to past transactions to keep the grant limited to non-mineral lands, or whether that clause which, if effective, will accomplish the intention of Congress, shall be adjudged void and the rest of the patent valid, and the will and intention of Congress expressed in the statute and patent be defeated and hundreds of millions of dollars worth of mineral lands, which Congress has said should not pass by operation of this grant, be turned over under it to this corporation, contrary to the express provisions of its grant.

It must be remembered that if the government officers had no authority to issue the patent which they did issue, yet the fact remains that *they issued none other.*

No injury can result to the railroad company from an adjudication that the patent is effective to save and reserve mineral lands to the government, for it would deprive the railroad company of nothing which was granted, while if it is not held effective, the railroad company will acquire title to lands which it is by law prohibited to ac-

quire under the grant. If it is held effective they can select lieu lands.

The discussion of the joint resolutions in the senate does not show that the saving clause thereof was intended only to protect actual settlers.

The Circuit Court was of the opinion that the discussion in the senate of the joint resolution, at the time it was passed by that body, shows that the clause in the joint resolution:—"expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided in the third section of said act"—was solely for the purpose of protecting actual settlers upon the lands along the line of the road, and that the resolution furnished no authority for the issuance of a patent containing a mineral exception clause.

This descussion is found in the Congressional Globe, part 5, second session, 41st Congress, 1869-70, May 31st, 1870, pp. 3350-51-52-53. Practically all that was said in the discussion was said by Senator Casserly of California. He desired to have the senate adopt in place of the language of the resolution last above quoted, the following language as a part of the resolution:

"And provided, that all persons who before the passage of this joint resolution shall have located themselves as actual settlers upon any portion of the lands affected by this joint resolution, or by

the said act of July 27, 1866, or included in the lands withdrawn by order of the Secretary of the Interior of March 18, 1867, or at any other time, for or on account of said Southern Pacific Railroad Company, whether such persons shall have so located themselves before or after such withdrawal, shall have the right to enter, under the homestead or pre-emption laws of the United States, the lands upon which they have so located themselves in the quantities allowed by said laws, and upon the terms provided thereby."

It will be noted that this amendment which Mr. Casserly desired substituted for the amendment which was adopted, says absolutely nothing about saving anything but the rights of actual settlers, while the amendment which was adopted, viz.—"Expressly saving and reserving of the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act"—includes all the conditions and restrictions of the third section of the Act of July 27, 1866. The court evidently became confused on this point, for certainly what was said by Mr. Casserly in the senate at the time the joint resolution was passed furnishes no aid in the construction of the resolution as it was passed. The amendment which Mr. Casserly desired was rejected, which was a rejection of his argument.

Moreover, it will be noticed that the joint resolution of June 28th, 1870, says that the company

may construct its road *as near as may be* on the route designated by the map filed by said company in the Interior Department on the 3rd of January, 1867. The route indicated by that map has always been considered as the general route, and the map, as the map of general location and not of definite location; therefore, the rights of actual settlers upon the land were fully protected under the Act of July 27th, 1866, for the simple reason that the railroad company could acquire no right to any land along the line of the road until the map of *definite* location was filed, and it had not been filed at the time the joint resolution was passed.

Southern Pacific Company v. Rahall, 3 L. D. 321.

It is therefore clear that the clause in the joint resolution requiring the saving in the patent of the conditions and restrictions contained in the 3rd section of the Act of June 27th, 1866, was for some special purpose, and that purpose could be nothing else than to authorize the Secretary of the Interior to insert in the patent an appropriate clause to save and reserve to the United States those restrictions and conditions of the grant in cases where the records of the land office did not show to what lands those restrictions and conditions applied, and those records would show what lands were occupied by settlers, but would not show what were mineral.

1. (c) *The weight of authority is to the effect that the saving clause in the patent is effective and limits the title of the railroad company to lands non-mineral in fact.*

Cowell v. Lammers, 21 Fed. 200, is a case upon which appellees rely to establish the invalidity of the mineral exception clause contained in the patent. In that case the patent was issued under a railroad land grant which provided, "That all mineral lands *shall be excepted* from the operation of this act" and the patent contained the clause "Yet excluding and excepting all mineral lands should any such be found to exist in the contracts described in the foregoing."

Judge Sawyer, who wrote the opinion in that case and in *Francoeur v. Newhouse, infra,* was committed to the proposition that the granting statute excepted from its operations only lands known at the time of the grant to be non-mineral. It appears from the recital of facts in that case that the land was in the actual possession of another who had purchased it from the railroad company, and prior to the patenting of it to the railroad company the land had been worked as a placer mining claim and had been abandoned because it did not pay, and that at the time the patent was issued the land was considered of no value as mineral land. Judge Sawyer held that a mineral locator could initiate no right upon the land when it was in the actual possession of an-

other under color of title. It is true that he also held that there was no authority in the statute for the insertion of a clause in the patent excluding mineral land from the conveyance. As a reason for this he states that the records and notes of the survey are the evidence upon which the character of the land must be determined *prima facia*. This holding, of course, was overruled in the Barden case, where it is distinctly held that the law does not contemplate the ascertainment of the mineral or non-mineral character of the land from the field notes of the survey, but that the information furnished by those notes is gathered incidently for the use of the Interior Department. He also holds that such an exception could in no case apply to mineral lands which were not at the date of the patent known to be mineral. This ruling was evidently based on the fact that the exception of all mineral lands from the operations of the statute which made that grant was not *in praesenti* but was rather a direction for the exclusion of them by the officers.

Francoeur v. Newhouse, 40 Fed. 318, upon which appellees also rely further explains the position of Judge Sawyer and his consideration of the statute in Cowels v. Lammers. In Cowels v. Lammers, he held, among other things, that the exception in the patent only applied to lands known at the date of the patent to be mineral, and as the word "known" was not in the patent, he

saw that to be consistent he must hold in Francoeur v. Newhouse that the statute, which did not contain the word "known" in the exclusion of mineral lands, must also be construed to mean lands *known* at the date of the grant to be mineral, if the decision in Cowels v. Lammers was correct.

Judge Sawyer was certainly consistent in this, but it is not consistent to say that the language of the granting *act*, "all mineral lands," means all mineral lands known or unknown, and that the same language in the patent includes all known mineral lands but not any unknown mineral lands. There is no reason for construing this language as meaning one thing when used in the patent and meaning something else when used in the statute. Therefore, we say that the exclusion clause contained in the patent was interpreted by this court in the Barden case when, in interpreted the clause excluding all mineral lands from the operations of the statute, it is said that "all mineral lands" means *all mineral lands*, and does not mean "all *known* mineral lands."

Judge Sawyer was of the opinion that only lands known to be mineral at the date of the grant were excluded from the operation thereof, and this opinion was the basis of his decision both in the case of Cowell v. Lammers and Francoeur v. Newhouse. Both of these cases were decided before the opinion in Barden v. Northern Pacific,

154 U. S. 288, was written, and when this court held in that case that the words "All mineral lands" mean all mineral lands whether known or unknown, and that they do not mean "All known mineral lands," all the reasoning of Judge Sawyer was of no avail. It is not too much to say that the Barden case deprives both the cases, Cowell v. Lammers and Francoeur v. Newhouse, of all their force as authorities. The Barden case also states that the officers of the Interior Department may lawfully insert in the patent a clause excepting mineral land if they have not made sufficient examination of the land described in the patent to justify their statement in it that all the land therein described is non-mineral.

Shaw v. Kellogg, 170 U. S. 312, is another case upon which appellees relied to sustain their contention in the case at bar, and it does not, for the reason that in that case there was a decision of record by the proper officers, after an examination and determination, that the land was non-mineral in fact. The grant was of a privilege to the heirs of one Baca, who claimed the land upon which Los Vegas in New Mexico is located, to select in lieu thereof "an equal quality of vacant land, non-mineral, in the territory of New Mexico" and the Act of Congress made it "the duty of the surveyor general of New Mexico to make survey and location of the land so selected" upon application to him by the beneficiaries of the grant.

Instructions were sent to the surveyor general by the General Land Office to the effect that his certificate of the survey and location to the General Land Office "must be accompanied by a statement from the register and receiver that the land is vacant and not mineral." Application was made by the beneficiaries of the grant for a survey. The surveyor general of Colorado in whose jurisdiction the territory wherein the selection was made had been included, wrote the General Land Office, "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and he intended to locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the General Land Office informed him also, directly, that his certificate of the survey and location "must be accompanied by the certificates of the surveyor general and the register and receiver, that the land selected is vacant and non-mineral," and added:

> "Especially should the character of the locations as to minerals be carefully ascertained after the important statement of Ex-Governor Gilpin which you communicated in your official letter to this office. When you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to to do so, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office."

Survey of the land was made under contract with one Sheldon which was disapproved and the surveyor general was again told that the certificate of the survey and location must be accompanied by the certificates of the surveyor general and the register and receiver, that the land is vacant and not mineral.

Thereafter the surveyor general sent to the General Land Office the following certificates as to the character of the land:

"Denver, C. T., Dec. 15, 1863.

Sir:—

This is to certify that from good and sufficient evidence, I am perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon in November, 1863, is not mineral and is vacant.

Very truly your obedient servant,

JOHN PIERCE,

Surveyor General of Colo. & Utah."

"Colo. Ty. Golden City, Dec. 5, 1863.

Sir:

This is to certify that from good and sufficient evidence, we are perfectly satisfied

that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,
Register Land Office Colo. District.
C. B. CLEMENTS.
Receiver Land Office Colo. Ty."

To this the General Land Office replied:

"Evidence furnished by you is not sufficient in the opinion of this office to prove that the selection of No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon information and conclusions deduced from reason. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of Ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality."

On Feb. 12, 1864, the General Land Office again wrote to the surveyor general in part as follows:

"The difficulty, however, may be avoided by pursuing the following course: The general field notes duly verified and authenticated, must be filed in the surveyor general's office of Colo.; upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized in virtue of the aforesaid sixth section of said Act of June 21, 1860, to approve the said sur-

> vey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist."

This was plainly an adoption of the survey made by Sheldon as the survey of the surveyor general after satisfactory tests and examination of that survey by him, and after the determination by him that the survey was correct. The field notes of this survey, given on pages 322 and 323, set forth a very careful statement as to the character of this land and concludes with this statement:

> "Saw no indications of the precious metals or other minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general.

On January 14, 1868, application for patent was made and refused on the ground that the statute did not authorize the issuance of the patent, and in denying the application the commissioner of the General Land Office called attention to the fact that before locating the land "the surveyor general had expressly found and certified that this land was not mineral" and the construction placed upon that act by the Interior De-

partment is set forth by the commissioner in his letter as follows:

> "The condition and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location when the title passed to be non-mineral land."

It will be noted that there was in this granting act no provisions excepting mineral lands from the *operations* of the act. The land was not granted *in praesenti* by the statute. No title could pass under the statute until the determination and decision was made by the proper officers that the land was non-mineral, and that when such decision was made the title passed and that the decision that it was non-mineral was made by the proper officers, and the records of the proceedings for the *passing of the title by the officers of the department, showed that the necessary decision as to the character of the land was made.*

This case is clearly an authority for the proposition that whenever a grant not *in praesenti* of public lands, of any particular character is made, either by the statute or by a patent, to vest absolute title in the grantee, there must be a determination by the proper officers that the land is of the character granted and that such determination must appear as a part of the records of the proceedings of the officers of the Interior Department, whose duty

it is to carry the grant into effect. That the court considered such finding and record necessary to the passing of the title, is evidenced in this opinion by a quotation from the case of Deffenback v. Hawke, 115 U. S. 392, 404, as follows: "The land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of the conveyance *with recitals showing compliance with the law and the conditions which it prescribes*" (italics ours), and also by the court's consideration of the decision made in the Barden case. Speaking of that case at page 339, Justice Brewer, who dissented in the Barden case, uses the following language: "It is true there was a division of opinion, but that division was only as to the time at which *and the means by which the non-mineral character of the land was settled.*" (Italics ours.) That an examination and determination of the character of the land and the statement of that determination in the patent were the *means* by which the character of the land should be settled, is further evidenced by other quotations from the Barden case in Shaw v. Kellogg, as follows: "It can hear evidence upon and determine the character of lands to which the parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimants the patent provided by law, *specifying that the lands are of the character for which patent is au-*

thorized" (italics ours); and again, "the fact remains that under the law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title* of the Government to the grantee, reposes in officers of the Land Department." (Italics ours.)

The grants under the statute considered in Shaw v. Kellogg was completed by the selection, the survey and location of the land and the finding by the proper officers that the land was non-mineral. The evidence of the title was the records of these proceedings. No one will contend that if the records of those proceedings did not show affirmatively a determination that the land was non-mineral, the title could have passed.

McLaughlin v. Powell, 50 Cal. 64.

In this case plaintiff held by mesne conveyance from the railroad company, which claimed to have acquired title by a patent dated May 31, 1870, issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The patent contained the clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands' should any be found to exist in the tracts described in the foregoing."

The defendant offered to prove that the land was mineral land, that he had held it as a mining claim since October, 1866. The trial court excluded this evidence and the plaintiff recovered.

The Supreme Court reversed the case for the exclusion of this evidence and said:

> "The exception contained in the patent is part of the description and is equivalent to an exception of all of the subdivisions of land mentioned, which are 'mineral lands,' in other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral lands and does not necessarily extend to all the tracts granted.
>
> "We think the defendant should have been allowed to prove that the demanded premises were mineral lands. Judgment reversed."
>
> Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194.

The land was claimed by mesne conveyance from the railroad company who claimed to have acquired title by patent issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The defendant claimed under the mining patent dated August 16, 1883, the court below found that the land in dispute had been known and worked as mineral land since 1861. The patent to the railroad company contained the following clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands', should any be found in the tracts described in the foregoing."

The court held that the mining patent of 1883

was valid and that the land did not pass to the railroad company under its patent issued under the railroad land grant.

Gale v. Best, 78 Cal. 235.

The plaintiff sued and recovered land from the defendant. Plaintiff held it by mesne conveyance from a railroad company under a grant by Congress. The granting act excluding all mineral lands. The patent issued under that grant *contains no clause excepting or excluding mineral lands from the operations of the patent.* The defendant in 1885 located the land as mineral and began mining operations thereon; the court held that as there was no reservation or exception of mineral lands in the patent, the patent raised a conclusive presumption, against collateral attack, that the land was non-mineral, and the plaintiff recovered. In this case the court affirmed the doctrine of McLaughlin v. Powell, *supra,* and Chicago Quartz Mining Company v. Oliver, *supra,* and said that those cases differed from the one then at bar *because in those cases the patent excepted "all mineral lands" should any such be found therein.*

In Van Ness v. Rooney, 160 Cal. 131, the Supreme Court of the state of California reaffirmed the doctrine of McLaughlin v. Powell and Chicago Quartz Mining Company v. Oliver, and held the mineral exception clause in the patent valid.

That the Federal statute of March 2, 1896, was not applicable to a patent containing such mineral exception clause, and that such patent does not create a conclusive presumption that the lands therein described are non-mineral, and that the mineral exception clause is a part of the description of the land mentioned in the patent.

In Eastern Oregon Land Company v. Willow River Land and Irrigation Company, 187 Fed. 466, an opinion by Judge Bean held that the railroad land grant patent containing the clause "yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid," "manifests an intention on the part of the government not to convey mineral lands and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

Here is an unbroken line of authorities that the mineral exception clause contained in the patent here pleaded is valid and effective and prevents mineral lands from passing either by the granting act or the patent.

To these must be added the statement of this court in the Barden case:

> "The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, *without excepting mineral lands,* until it has had an opportunity to have the country, or that part of it for which patent is sought, sufficiently explored

> to justify its declaration *in the patent*, which would be taken as its determination, that no mineral lands exist therein." (Italics ours.)

The only way they could except mineral lands before the country had been "sufficiently explored to justify its *declaration in the patent*, which would be taken as its determination, that no mineral lands exist therein," was by inserting in the patent the mineral exception clause, which they did insert; and it should be noted that the purpose of "excepting mineral" lands was, under the above language, to withhold title of *unknown* mineral lands.

It appears conclusively from the foregoing observations *that the granting statute is the appellees' only source of title in this case.*

V.

Petroleum or Mineral Oil is Within the Meaning of the Term Mineral as it was Used in the Acts of Congress Reserving Mineral Lands From the Railroad Land Grants.

This court has uniformly held that the exclusion of all mineral lands from the operations of such acts is a limitation intended for the benefit of the public, and must be liberally construed and strictly enforced to carry out its purpose and give effect to the intent of the statute. A necessary corollary to this proposition is, that the term mineral should be interpreted to include all natural deposits in the earth's crust, which give to the lands in which they are found the natural advantages on account of which Congress reserved all mineral lands from the grants. This forbids the application of the broad definition of mineral as an inorganic substance found in the earth, and likewise forbids a definition which will restrict the interpretation of the term, to metaliferous minerals. The *natural advantage* of mineral lands was the reason which induced Congress to reserve them, and that advantage is due entirely to the *value* of their *natural deposits,* without regard to whether they were metaliferous or non-metaliferou fosiliferous, argill aceous, or solid, liquid or gaseous. These peculiarities or properties of various minerals are not determinative of their

relative values and therefore are not a proper basis of determining whether they are within or without the term mineral as used in an Act of Congress.

The circumstances under which these grants were made are sufficient reason for holding that the value of the mineral in the lands is determinative of whether they are mineral or non-mineral within the meaning of the acts. The territory through which the roads would pass was unexplored. No one knew the extent or value, present or prospective, of the natural deposits which were stored in them. In estimating the amount of land which it would be proper to grant it was necessary to consider its value with the road completed. If the grant were confined to lands not mineral, Congress could estimate with some degree of accuracy the value of public property which the grant made would include; but if it were not so limited no one could estimate the value of the grant for in such case it was not only possible, but was probable that the land opposite a small portion of the road would be of more value than the entire railroad built under the grant and all other property necessary to the operation of the road. And, indeed, this very thing has turned out to be true in the case of petroleum lands in California, if this court holds that petroleum is not a mineral within the meaning of this granting act.

It is clear from these considerations that the value, present and prospective, of a mineral deposit, taking into account both its quantity and quality, is the proper basis for determining, under these grants, whether lands are mineral or non-mineral. Such is the rule uniformly applied by the government in administering our public land laws. The fact that a deposit of mineral is not of present value, on account of insufficient transportation facilities or the uninhabited condition of the country wherein it is found, has never been regarded by the government as sufficient ground for classifying the land in which it is found as non-mineral. A wise public policy looks to the future.

At the date of this grant—so far as this question is concerned, June 28, 1870,—the date of the point resolution, without which the railroad company could not have acquired this grant, petroleum or mineral oil was being extensively produced in this country and was recognized as a natural deposit of great value. It was obtained from Sicily by the Romans and used for illuminating. It was discovered in large quantities in Pennsylvania in 1859, and in 1865, 2,497,700 barrels of it were produced in this country; in 1870, 5,200,745 barrels were produced. In 1860, 100 square miles of land at Oil Creek, Pennsylvania, had been determined to be oil producing.

Vol. 15, p. 670, New International Encyclopaedia.

Therefore, at the date of this grant, petroleum or mineral oil was known to be a mineral product of great value and was being produced in this country and was an article of commerce and trade.

In 1859 "The news of its discovery was followed by a rush of adventurers from all parts of the country, so that in 1860 100 square miles of territory in the vicinity of Oil Creek (Pa.) had been shown to be productive." *Id.* This "rush" of people to the oil fields in 1859 shows very clearly that oil was known, before 1870, or even 1866, to be a mineral produce of value sufficient to warrant its production for profit. Fortunes were made in a day by its discovery on a small parcel of ground before this railroad company acquired its grant.

"The growth of the petroleum industry in the United States is shown in the following table which gives the annual production at intervals from 1859 to 1905:

Years.	Barrels.
1859	2,000
1860	500,000
1865	2,497,700
1870	5,200,745
1875	10,926,945
1880	26,286,123
1885	21,858,785
1890	45,823,572

1895	52,892,276
1900	63,620,529
1905	134,717,580."

Id., p. 674.

Public lands, valuable for their deposits of petroleum, have always been subject to location, entry and patent under the placer mining laws of the United States, and government's definition of mineral lands is based upon the *value* of the deposits in them, taking into account the quantity and quality of the deposit. Its definition has always included petroleum as a mineral. A review of the government's position in this regard will be found in the case of Union Oil Company (on review) 25 Ld. Dec. 351.

The decision in that case calls attention to the language of the first section of the mining laws, Act of May 10, 1872: "In all cases *lands valuable for minerals* shall be reserved from sale, except as otherwise expressly provided by law," and "all *valuable* mineral deposits in lands belonging to the United States," * * * "and the lands in which they are found" are thrown open to exploration and purchase. The word "mineral" is used here in its broadest sense with the qualification that the deposit must be "valuable" in order to bring it and the land in which it is found under the statute. July 15, 1873, the first departmental circular on the subject of the mining laws was issued. It stated:

"That whatever is recognized as a mineral by the standrad authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the perview of the Mining Act of May the 10th, 1872."

It was further stated:

"The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, 'to promote the development of the mining resources of the United States,' and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands."

The commissioner also stated in the same circular that borax, carbonate of soda, nitrate of soda, sulphur, alum and asphalt, as well as 'all valuable mineral deposits' may be applied for and patented under the provisions of the Mining Act of May 10, 1872. (Copp's Mineral Lands, 61.)

On January 30th, 1875, the department also held that lands containing valuable deposits of petroleum may be entered under the mining acts of 1872, (Sickles' Mining Laws, 491), and on March 31, 1882, Commissioner McFarland stated, "Lands containing deposits of petroleum have

been entered as placers and patented as such," and held "that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims."

In the case of W. H. Hooper, 1 L. D. 560, the views expressed in the circular of July 15, 1873, were concurred in and approved by Secretary Kirkwood. In Maxwell v. Brierly, 10 C. L. O. 50, Secretary Teller, after referring to the circular of July 15, 1873, approved its doctrine and held that lands containing "gypsum, limestone, asphaltum, borax, auriferous cement, fireclay, kaolin, mica, marble, petroleum, slate and other substances" were minerals within the mining laws of the United States. This same doctrine is approved in 25 Land Decisions at pages 354 and 355, where it was decided that lands chiefly valuable for oil deposits contained in them may be located, entered and patented under the placer law. And at pages 356-7 the Department reaffirmed its previous decision in the case of Pacific Coast Marble Co. v. Northern Pacific Railroad Co. (25 L. D. 233):

> "That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the perview of the mining law."

And that

> "Lands containing valuable mineral deposits, whether of the metaliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are 'mineral lands' *within the meaning of that term as used in the exception from the grants to the railroad company and to the state.*" (Italics ours.)

In Gird v. California Oil Co., 60 Fed. 531, 532, it was said on the 26th of February, 1894, that

> "The premises in controversy are oil bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."

The opinion in that case discusses the law relative to mining, location of claims, notice, recording and posting, description, work done, working of oil, etc., and its application to oil claims.

In Northern Pacific v. Soderberg, 188 U. S. 528, this court said:

> "Under the allegations of the bill the fact that the land department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant." Page 528.

That case involved the question whether granite was a mineral within the meaning of the Northern Pacific grant and the court decided that it was and was therefore excluded from the grant. The court discussed at length what is and what is not mineral land or mineral within the meaning of these grants and approves the rulings of the Land Department which include as mineral within the meaning of the granting acts, alum, asphalt, borax, guano, diamonds, gypsum, resin, marble, micca, slate, amber, petroleum, limestone, building stone and coal. Page 534.

That case is conclusive against the contention of the appellees that petroleum is not a mineral within the meaning of this granting act. The decision in that case is clearly based upon the principle that the value of the deposit, taking into account its quantity and quality, is what determines whether the land in which it is found is mineral or non-mineral within the meaning of the granting act.

The question raised by this cause, and to which the determination of the questions certified are incidental, is: Did the *patent issued,* containing, as a part of its description, the clause: "Yet excluding and excepting 'all mineral lands', should any such be found in the tracts aforesaid, but this exception and exclusion shall not be construed to include 'coal and iron' lands," pass title to mineral lands?

The correct determination of this question is of great public importance, for it will be decisive of whether the United States or land grant railroads, have title to mineral lands of the value of a billion of dollars. In the decision of this question this court is entirely unhampered by previous rulings.

We have endeavored to present the case in its logical sequence, with a view to aiding the court in answering the questions certified, and have, in the front part of this brief, inserted an analytical index, giving the pages at which will be found the portions of the brief bearing upon each question certified and for the reasons, herein stated, we respectfully submit that all the questions certified by the court below should be answered adversely to the contentions of appellee.

E. W. Haggett.

and

D. J. Hinkley

Attorneys for Appellants.

BURKE *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

LAMPRECHT *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 279, 280. Argued January 13, 14, 1913.—Decided June 22, 1914.

The act of July 27, 1866, making a grant of alternate odd numbered sections of public land to the Southern Pacific Railroad Company in aid of the construction of its main-line railroad did not include mineral lands, but on the contrary excluded them from its operation

and provided that the company should receive other lands as indemnity for them.

The administration of the grant, including the issue of patents following the construction of the road, was committed to the Land Department of which the Secretary of the Interior is the supervising officer.

It was contemplated by the granting act that the mineral or non-mineral character of the lands should be determined by the Land Department and that, depending upon the result, patents should issue or indemnity be allowed.

The patents were to be the legally appointed evidence that the lands described in them had passed to the company under the grant.

A patent issued under such a grant is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it.

If the land officers are induced by false proofs to issue such a patent for mineral lands, or if they issue it fraudulently or through mere inadvertence, a bill in equity on the part of the Government will lie to cancel the patent and regain the title; or, in the like circumstances, a prior mineral claimant who had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by a stranger who had no interest in the land at the time the patent was issued and was not prejudiced by it.

One who relocates land under the mining law (Rev. Stat., § 2324) by reason of the failure of a prior locator to perform the required annual assessment or development work is not in privity with such prior locator.

The officers of the Land Department are without authority to insert in patents exceptions not contemplated by law, and when they place unauthorized exceptions in patents the exceptions are void.

An exception inserted in patents issued under the grant here under consideration to the effect that if any of the lands described should be found to be mineral the same should be excluded from the operation of the patents is unauthorized and void, because the granting act contemplated that the patents should effectually and unconditionally pass the title.

An agreement between the railroad company and the land officers that such an exception in the patents should be effective is of no greater

force as an estoppel than the exception itself, and the latter is of no force whatever.

The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. Neither can the land officers enter into any agreement upon the subject. They are not principals but agents of the law, and must heed only its will.

If the land officers enter into any forbidden arrangement whereby public land is transferred to one not entitled to it, the patent may be annulled at the suit of the Government, but those officers cannot alter the effect which the law gives to a patent while it is outstanding.

The joint resolution of June 28, 1870, relating to this grant did not authorize the use of any excepting clause in the patents.

THE facts, which involve the construction and validity of patents for land issued to the Southern Pacific Railroad Company under the Land Grant Act of July 27, 1866, and the effect of provisions in the patents as to the effect of subsequent discovery of minerals, are stated in the opinion.

Mr. Frederic R. Kellogg and *Mr. Roberts Walker*, with whom *Mr. Edmund Burke, pro se*, was on the brief, for Burke.

Mr. D. J. Hinkley, with whom *Mr. T. J. Butler* was on the brief, for Lamprecht and Aiken, trustees.

Mr. Maxwell Evarts, with whom *Mr. Henry W. Clark*, *Mr. Gordon M. Buck* and *Mr. A. A. Hoehling, Jr.*, were on the brief, for the Southern Pacific Railroad Co.

By leave of court, *The Solicitor General* filed a memorandum on behalf of the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In 1910 Edmund Burke filed a bill in equity in the Circuit Court of the United States for the Southern District

of California, against the Southern Pacific Railroad Company, the Kern Trading and Oil Company, and several individuals, wherein he sought a decree establishing certain rights claimed by him in five sections of land in Fresno County, California, and enjoining the defendants from asserting any right or interest therein. A cross-bill was filed by J. I. Lamprecht and other individual defendants, and the two corporate defendants demurred to both bills. The demurrers were sustained and a decree was entered dismissing the bills, for reasons assigned in an opinion announced the same day in *Roberts* v. *Southern Pacific Co.*, 186 Fed. Rep. 934. The complainant and cross-complainants appealed to the Circuit Court of Appeals, and it certified the case here under the Judicial Code, § 239, for instruction upon designated questions of law.

According to the certificate, the bill alleged, in substance, that in 1892 the five sections were public lands and were located as placer mining claims under the mining laws of the United States, each location being preceded by a discovery of mineral within its limits; that on May 9, 1892, the railroad company, with knowledge of these locations, made application at the local land office to have the five sections, with others, patented to it under the land grant made to it by the act of July 27, 1866, c. 278, 14 Stat. 292, §§ 3, 4, 18, and the joint resolution of June 28, 1870, 16 Stat. 382, No. 87, and did then corruptly cause one Madden, its land agent, to make and present at such land office, in support of such application, a false and fraudulent affidavit stating that the application contained a correct list of lands inuring to the railroad company under its grant, and that the listed lands were vacant, unappropriated and not interdicted, mineral or reserved lands; that no notice of such application was given to any of the placer claimants, and no hearing was had in the local office or in the Land Department with the purpose of

determining the character of the lands; that on July 10, 1894, without any such investigation or determination, a patent was issued to the railroad company purporting to convey to it, among other lands, the five sections in controversy; that the patent contained a clause reading: "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands"; that the railroad company accepted the patent and caused it to be recorded in Fresno County; that in virtue of the patent the railroad company claims to own all the lands described therein, including the five sections; that in March, 1909, the original mineral claimants having failed to perform the required assessment or development work for the preceding year, the complainant and certain associates of his entered upon the five sections and relocated the same as placer mining claims under the mining laws of the United States, each of the new locations being preceded by a discovery of mineral within its limits; that the lands contain petroleum in commercial quantities, which makes them more valuable for mining than for agricultural purposes; that the complainant is the owner of an undivided one-tenth interest in the mining claims created by the new locations; and that the oil company, although claiming as a lessee of the railroad company, is a mere instrument of the latter, being entirely owned, dominated and controlled by it.

According to the certificate, the cross-bill set forth substantially a like state of facts, sought the same relief, and also contained the following allegation: "These cross-complainants further say and show unto the court that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to

be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent, or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the Recorder of the County of Fresno, and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part or any thereof."

The questions propounded in the certificate are as follows:

"FIRST. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

"SECOND. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"THIRD. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

"FOURTH. If the reservation of mineral lands as ex-

pressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

"FIFTH. Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?

"SIXTH. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

"SEVENTH. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

At the outset it is well to observe that this is not a suit by the Government to cancel or annul a patent for fraud practiced upon the land officers in its procurement or for any fraudulent act, error of law, or mistake committed by them in issuing it (see *United States* v. *Minor*, 114 U. S. 233; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Germania Iron Co.* v. *United States*, 165 U. S. 379); nor is it a suit to have one to whom a patent has issued declared a trustee for another who, at the time of its issue, had acquired such a right to the land as to entitle him to that form of equitable relief (see *Silver* v. *Ladd*, 7 Wall. 219, 228; *Lee* v.

Johnson, 116 U. S. 48; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587; *Svor* v. *Morris*, 227 U. S. 524). On the contrary, the suit is one wherein rights asserted under a patent are called in question by parties whose only claim to the land was initiated more than fourteen years after the date of the patent.

As the fifth question has been presented in separate briefs and the occasion for considering the other questions turns upon the answer to it, we take it up first. It is: "Is petroleum or mineral oil within the meaning of the term 'mineral' as it was used in said acts of Congress reserving mineral land from the railroad land grants?"

This granting act, like several others of that period, expressly excluded from its operation "all mineral lands" other than iron and coal lands. No attempt was made at defining "mineral lands," and doubtless the ordinary or popular signification of that term was intended. Apparently it was used in a sense which, if not restricted, would embrace iron and coal lands, else care hardly would have been taken to declare that it should not include them. This was deemed a reasonable inference in *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526, where a contention that it embraced only metalliferous lands was rejected. The question there was, whether it included lands containing valuable bodies of granite, and the holding was that it did. While avoiding an exact definition, the court was of opinion that it comprehended all lands "chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

Petroleum has long been popularly regarded as a mineral oil. As its derivation indicates, the word means "rock oil," an oily substance so named because found naturally oozing from crevices in rocks. Its existence in this country was known from very early times, and when this and other railroad land grants, containing an

exception of mineral lands, were made, the extraction of oil from its natural reservoir in subterranean rocks had come to be a promising industry and was extending over an increasing area through discoveries of new oil fields. An official report laid before Congress a few months before this grant was made showed that the daily output of the oil wells in Pennsylvania, Ohio, West Virginia, and Kentucky was 12,000 barrels. H. R. Ex. Doc. No. 51, 39th Cong., 1st Sess. In the same year the Supreme Court of Pennsylvania, in disposing of an oil-land controversy, not only treated the oil as a mineral but spoke of the work of extracting it from the containing rocks as "mining for oil," and, in concluding the opinion, said: "Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth." *Funk* v. *Haldeman*, 53 Pa. St. 229. And in another case that court said: "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." *Gill* v. *Weston*, 110 Pa. St. 312, 317. Its mineral character has also been affirmed by the courts of other States. *Williamson* v. *Jones*, 39 W. Va. 231, 256; *Kelley* v. *Ohio Oil Co.*, 57 Oh. St. 317, 328; *Murray* v. *Allred*, 100 Tennessee, 100; *Wagner* v. *Mallory*, 169 N. Y. 501, 505. Congress at different times has spoken of it as a mineral (15 Stat. 58, 59, c. 41, § 1; Id. 125, 167, c. 186, § 109; 29 Stat. 526, c. 216; 32 Stat. 691, 702, c. 1369, § 42; 36 Stat. 847, c. 421), and this court did so in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 202.

In the legislation of Congress the term "mineral lands" is not confined to railroad land grants. It occurs in the mining laws, in an excepting clause in the homestead law, and in like clauses in other public-land laws. Evidently it has the same meaning in all. The administration of these laws has rested with the Land Department, and there-

fore its course of action in respect of oil-bearing lands—whether it has held them to be mineral or otherwise—requires to be noticed. The various mining circulars, instructions and decisions, as published from time to time, show that the matter probably was not considered prior to the first mining circular, July 15, 1873, but that since then the Department has regarded petroleum as a mineral and has treated lands chiefly valuable therefor as mineral lands.[1] With a single exception, the rulings have been uniform, and lands of great value have passed into private ownership under them. The single exception is the case of *Union Oil Co.*, 23 L. D. 222, 226, decided August 27, 1896, which was revoked on a motion for review November 6, 1897, 25 L. D. 351. It appears from the later decision that action upon other pending cases turning upon the same question had been suspended in the meantime, so, practically speaking, there has been no break in the Department's rulings. The case of *Union Oil Company* presented a controversy between that company and the Southern Pacific Railroad Company over a tract of land in California, the former claiming under a placer mining claim and insisting that the land was chiefly valuable for petroleum and therefore mineral, and the latter seeking a patent under its land grant and insisting that the land, even if chiefly valuable for petroleum, was not mineral. In the original decision the Secretary of the Interior held that the word "mineral" embraced only "the more precious metals," such as "gold, silver, cinnabar, etc.," but on the rehearing this view was rejected and the prior rulings holding petroleum to be a mineral

[1] Circular July 15, 1873, Copp's Mineral Lands, 61; Letter of Commissioner Burdett, January 30, 1875, Sickles' Mining Laws, 491; *Maxwell* v. *Brierly*, 10 Copp's L. O. 50; Instructions January 30, 1883, 1 L. D. 572; *Roberts* v. *Jepson*, 4 L. D. 60; *Piru Oil Co.*, 16 L. D. 117; *Union Oil Co.*, 25 L. D. 351; *McQuiddy* v. *California*, 29 L. D. 181; *Tulare Oil Co.* v. *Southern Pacific Railroad Co.*, 29 L. D. 269.

were reaffirmed and applied, the railroad company's application for a patent being denied.

Notwithstanding these persuasive considerations for now regarding petroleum lands as mineral lands within the meaning of the excepting clause in the granting act, we are asked to give effect to the strictly scientific view that petroleum is a resultant of the decomposition of organic matter under certain conditions of temperature and pressure and therefore is not a mineral. As we understand it, scientists are not in full accord upon this point, some ascribing to petroleum an inorganic origin. Encyclopædia Britannica, 11th ed., Vol. 21, p. 318. But, passing this seeming divergence in opinion and assuming that when subjected to a strictly scientific test petroleum is not a mineral, we think that is not the test contemplated by the statute. It was dealing with a practical subject in a practical way, and we think it used the words "mineral lands," and intended that they should be applied, in their ordinary and popular sense. In that sense, as before indicated, they embrace lands chiefly valuable for petroleum.

Our answer to the fifth question must therefore be in the affirmative.

The other questions are so closely related one to another and turn so largely upon principles of general application to controversies arising out of the public-land laws, including railroad land grants, that it seems the better course to consider them in a general way in connection with those principles, and then to come to the specific answers to be given to them separately.

We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of

the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift.

Two distinct land grants were made to the Southern Pacific Railroad Company, one on behalf of the construction of a main line, and the other (act March 3, 1871, 16 Stat. 573, 579, c. 122, § 23) on behalf of a branch line. We are not here concerned with the latter. The former was made by the act of July 27, 1866, 14 Stat. 292, c. 278. That act first made provision for the construction of a line of railroad, by the Atlantic & Pacific Railroad Company, from Springfield, Missouri, westward through northern Arizona to the Pacific Ocean, and by its third and fourth sections made the following grant of public lands to that company:

"SEC. 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, *not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: . . . *Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: . . .

"SEC. 4. That whenever said Atlantic and Pacific Rail-

road Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

By its eighteenth section the act made provision for the construction by the Southern Pacific Railroad Company of a connecting line of railroad from the eastern boundary of California to San Francisco, and in that connection made the grant now under consideration. That section reads:

"That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare

with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

Turning to §§ 3 and 4, as must be done, to ascertain the nature, extent, conditions and limitations of the grant made by this section, it will be seen that it was of "every alternate section of public land, not mineral, designated by odd numbers," etc., and was accompanied by a declaration "That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided." Words hardly could make it plainer that mineral lands were not included but expressly excluded. This is fully recognized by counsel on both sides. But by whom and when was it to be determined whether lands otherwise within the grant were mineral and therefore excluded, or non-mineral and therefore included? How long was the question of the exclusion or inclusion of particular sections to be an open one? Was it to depend upon a discovery of mineral at any time in the future, even a hundred years after the completion of the railroad, or was it intended that the mineral or non-mineral character of the lands should be determined in administering the grant, and that, depending on the result, patents should issue or indemnity be allowed? We think these questions find clear and decisive answers in the granting act when considered in the light of settled principles of general application to the administration of the public-land laws, including railroad land grants.

As has been seen, the exclusion was of "all mineral lands." It was not a mere reservation of minerals, but

an exclusion of mineral lands, coupled with a provision that the company should receive other lands, not mineral, in lieu of them. This shows that a determination of the character of the lands, as mineral or non-mineral, was plainly contemplated. Besides, there was an exclusion of all sections and parts of sections "granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of" when the line of the road should be definitely located, and this was followed by a similar provision for lieu lands. The two exclusions and the indemnity provisions made it practically imperative that there be an authoritative identification of the lands passing under the grant and of those excluded, for otherwise great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable. Appreciative of this, Congress confided the identification of the lands, both included and excluded, to the Land Department, of which the Secretary of the Interior is the supervising officer. We say their identification was confided to that Department, because the granting act expressly provided for the issue of patents "confirming to said company the right and title to said lands," obviously meaning the lands granted but not the excluded lands, and also directed that the indemnity lands be selected "under the direction of the Secretary of the Interior," and because that Department was already expressly charged with the administration and execution of all public-land laws as to which it was not specially provided otherwise. Rev. Stat., §§ 441, 453, 2478. In *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167, which related to a grant, the identification and extent of which depended, as here, upon an ascertainment of matters of fact made material by the granting act, this court said: "While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general

powers vested in that department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

True, the grant now under consideration was *in præsenti* in the sense that the title to the granted lands, when they should be identified, passed as of the date of the granting act; but, as has been indicated, the act did not itself identify them, and in the nature of things that was not practicable. It was not certain that the road would be constructed, or what lands would be free from other claims at the time of its definite location, or what would be mineral. This led to the use of general descriptive terms which required to be applied to particular lands, should the road be constructed. And so it was that provision was made for issuing patents "confirming to said company the right and title to said lands" after construction. A real necessity would then arise for identifying the lands passing under the grant. This was obviously the purpose of the patents. They were to be in confirmation of the company's "right and title," and so were to be the legally appointed evidence that the lands described in them had passed to the company under the grant.

As it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and the duty of determining in every instance whether the land came within the terms of the grant, or for any reason was ex-

cluded from it, and of giving appropriate effect to the result by granting or refusing a patent. This is the theory upon which the Land Department uniformly has proceeded in the administration and adjustment of this and other railroad land grants, and this court repeatedly has pronounced it the true theory. The departmental view and practice are shown in *Central Pacific Railroad Co.* v. *Valentine*, 11 L. D. 238, where it was said by Secretary Noble (p. 243): "It is not questioned that the Land Department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or was subject to 'a preëmption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists, there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status, at the date when the rights of the company attached under the grant." Again (p. 244): "All the lands within the primary limits of a railroad grant do not necessarily pass to the railroad, but only such as are not within the exceptions named in the grant, and the Secretary of the Interior is clothed with the authority of determining in the first instance which lands pass by the grant and which do not pass, and this he does by approving lists for certification or patent." And again (p. 246): "Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to, or for the use of, the railroad company. By reason of this jurisdic-

tion it has been the practice of that Department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character, at any time before the date of the patent."

The same subject came before this court in *Barden* v. *Northern Pacific Railroad Co.*, 154 U. S. 288. The case arose under a grant (July 2, 1864, c. 217, 13 Stat. 365) containing an exclusion of mineral lands, provisions for indemnity, and a direction for patents, identical with those now under consideration; the grant being followed by a joint resolution (January 30, 1865, 13 Stat. 567) which, referring to that and other grants made at the same session, declared that none "shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." On the part of the railroad company it was insisted that the conditions existing when the line of railroad was definitely located should be taken as decisive of whether lands were mineral or otherwise in the sense of the mineral-land exclusion, and much apprehension was expressed lest a different ruling would put the matter so at large that a discovery of mineral at any time in the future would defeat titles supposedly complete. By leave of the court, the Solicitor General appeared on behalf of the Government, and took the position shown by the following extract from his brief (154 U. S. 296–298; Brief, pp. 4–7):

"The act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.

"But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for

lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields' original brief (pp. 46 to 60).

"The point is also covered by the case of *Davis* v. *Weibbold*, 139 U. S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such discovery, and that the provision of the town-site act (Rev. Stat., § 2392) that 'no title shall be acquired to any mine of gold, silver, cinnabar, or copper,' does not apply where the mines were discovered after a patent has been issued.

"Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell* v. *Lammers* [21 Fed. Rep. 200, 206]: 'There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent.'

"And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior [5 L. D. 194]: 'The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.'

"And again, page 524: 'The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated.'

"In *Moore* v. *Smaw*, 17 California, 199, it was decided, in the first opinion delivered by Mr. Justice Field as chief justice of the supreme court of California, that the patent of the United States passes title to minerals.

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent canceled, as was done in *Morton* v. *Nebraska*, 21 Wall. 660, and in *The Western Pacific Railroad Company* v. *The United States*, 108 U. S. 510. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

"Here, then, is a method of adjusting the company's grant according to the procedure contemplated by the act itself, which protects fully the interests of both the Government and the railroad, and which is in accordance with the practice which has always prevailed in the Department of the Interior." Citing Secretary Noble's decision in *Central Pacific Railroad Co.* v. *Valentine, supra.*

The court rejected the contention that the conditions existing at the date of definite location were decisive of whether the land was mineral or non-mineral, and held that the question remained an open one until the issue of a patent. In the latter connection the court referred to prior decisions respecting the power and duty of the Land Department, in issuing patents, to inquire and determine whether the lands are of the class prescribed, whether there are other claims to them, and whether the applicant is entitled to a transfer of the title; reaffirmed its ruling in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, that a patent not only "operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary

to its issue have been complied with;" and further said (pp. 328, 329):

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preëmption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. . . . If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight* v. *Land Association*, 142 U. S. 161, 178, as the 'supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. . . .

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

And then, after quoting approvingly what we have already extracted from Secretary Noble's decision in *Central Pacific Railroad Co.* v. *Valentine*, *supra*, it was added (p. 330): "It is true that the patent has been issued

in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

Of the decision in that case it was concisely said in *Shaw* v. *Kellogg*, 170 U. S. 312, 339: "It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of

the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Maxwell Land Grant Case*, 121 U. S. 325, 379–381; *Heath* v. *Wallace*, 138 U. S. 573, 585; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174; *Burfenning* v. *Chicago, &c. Railway Co.*, 163 U. S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 313; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 239; *Germania Iron Co.* v. *United States*, 165 U. S. 379; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587, 590; *Hoofnagle* v. *Anderson*, 7 Wheat. 212, 214–5. In the last case this court said, speaking through Chief Justice Marshall: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. . . . If the patent has been issued irregularly, the Government

may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself." Of the same import are *Cooper* v. *Roberts*, 18 How. 173, 182; *Spencer* v. *Lapsley*, 20 How. 264, 273; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68.

The patent here in question was issued July 10, 1894. Apparently, the Government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900 or 1901. Acts, March 3, 1891, 26 Stat. 1093, c. 559; March 2, 1896, 29 Stat. 42, c. 39, § 1; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 450. Apparently, also, the prior mineral claimants never sought to have the patentee declared a trustee for them, for it is admitted that they abandoned their locations. The present mineral claimants, who are assailing the patent, claim under relocations made in March, 1909, more than fourteen years after the date of the patent and eight years after the apparent expiration of the time within which the Government could ask that it be vacated or annulled. Plainly, there is no privity between the earlier and later mineral claimants, for the relocations were not made in furtherance of the prior locations but in hostility to them. See Rev. Stat., § 2324.

But, referring to the clause in the patent, "excluding and excepting all mineral lands should any such be found in the tracts aforesaid," the contention is made, first, that the patent shows that the Land Department did not consider or determine whether the lands were mineral or not, and, second, that all lands embraced in the patent which then had been or thereafter should be discovered to be mineral were expressly excepted from the operation of the patent and therefore remained public lands. This contention must be tested in the light of the established practice in the Land Department in such matters and of the office which the granting act intended the patents to perform. The clause relied upon is not peculiar to this

patent or to those issued under this grant, but appears in all the patents issued from 1866 to 1904 under railroad land grants containing an exclusion of mineral lands. Its first mention in any public document was in the annual report of the Commissioner of the General Land Office for 1868. It was there said (pp. 152–154):

"In every case reported from the district land officers of selections made under the acts of 1862 and 1864, for the Pacific Railroad, the agent of the company in the first instance is required to state in his affidavit that the selections are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant. Upon the filing of lists with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned, and in other respects. They subsequently undergo scrutiny in this office, are tested by our plats, and by all the data on our files, sufficient time elapsing after the selections are made for the presentation of any objections to the department before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.' . . . It has been suggested to this office that the Government should appoint a commission to segregate the mineral from the residue of the public lands; but let anyone consider the vast amount of money expended by practical miners in excavations to test the value of mines, subsequently abandoned as worthless, and some idea may be formed of the time and expense such an undertaking would require, and how little confidence it would be likely to inspire. . . . The regulation of filing affidavits is simply a means of ascertaining the class

to which a particular tract of land may belong, and although it may not be the best that could be devised, it is the only practical mode that has suggested itself to meet the difficulty of disposing of different classes of land mingled together in such a way as to render it frequently impossible to tell, without great labor and expense, whether a particular subdivision belongs to one or the other class."

In addition to what was thus said respecting the affidavits and certificates required and the examination of whatever data were available, regulations were promulgated calling attention, among other things, to the mineral-land exclusion in the grants, directing that the lists be carefully and critically examined by the Register and Receiver and mineral lands be excluded therefrom, and prescribing forms of affidavits and certificates reciting, among other things, that the listed lands were non-mineral and of the character contemplated by the grant.[1] It also appears from the published land decisions that hearings were often had in the local land offices to determine whether lands sought to be listed were mineral or otherwise, and that appeals in such matters were not infrequently heard by the Secretary of the Interior.[2] From all this it is manifest that the excepting clause never was intended to take the place of an inquiry into the character of the land or to dispense with a determination of that question, and that its presence in the patents does not at all signify that no inquiry or determination was had. On the contrary, it appears that it was the accustomed practice to exact proofs respecting the character of the

[1] See 2 Lester's Land Laws, 362–365; 2 Copp's Land Laws, 715, 719, 727; 19 L. D. 21.

[2] See *Central Pacific Railroad Co.*, 8 L. D. 30; *Central Pacific Railroad Co.* v. *Valentine*, 11 L. D. 238; *North Star Mining Co.* v. *Central Pacific Railroad Co.*, 12 L. D. 608; *Southern Pacific Railroad Co.* v. *Allen Gold Mining Co.*, 13 L. D. 165; *California & Oregon Railroad Co.*, 16 L. D. 262; *Barden* v. *Northern Pacific Railroad Co.*, 19 L. D. 188.

land, to give opportunity for contests, and to give effect to whatever information was obtained. At most according to the Commissioner's report, the clause was intended to serve merely as an additional safeguard; and its words suggest that its use was with an eye to future discoveries rather than to existing conditions.

Coming to its effect in a patent, which is of more importance than how it came to be there, we find that this question came before the Land Department in the case of *Samuel W. Spong*, 5 L. D. 193. The tract in question had been patented to the Central Pacific Railroad Company under its grant, the patent containing the excepting clause. Spong applied at the local land office to enter the tract under the mining law, claiming that it was mineral and therefore excepted from the patent. The local officers refused his application, assigning as a reason that the title had passed to the company under the patent, and the Commissioner of the General Land Office affirmed their decision. The matter was then taken before Secretary Lamar, who sustained the decisions below, saying (p. 194): "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent." Again (p. 195): "In the case of *Deffeback* v. *Hawke* (115 U. S. 393), the court reviewed and commented on the several acts of Congress relative to the disposition of mineral lands, and held that the officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." And again (p. 196): "While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may

after the lapse of an indefinite number of years prove to be agricultural in character." The question was also presented in *Courtright* v. *Wisconsin Central Railroad Co.*, 19 L. D. 410. The land involved had been patented under a railroad land grant like that now before us, the patent containing the same exception. Courtright, claiming that the land was mineral, and was known to be such since before the patent, insisted that it remained public land and sought to make entry of it. The local officers held that this could not be done in the presence of the patent, and their ruling was sustained by the Commissioner. On appeal, Secretary Smith affirmed the action of the other officers, saying (p. 413):

"The issuing of patent is a determination by the Department that the lands embraced therein are of the character described in the grant.

* * * * * * * *

"If it was the intention of the officers of the Government to leave as an open question the character of the lands embraced in the patent, then they acted without authority, for when patent issued, that was the end of the jurisdiction of the Department over the lands. The exception contained in the patent went beyond 'giving expression to the intent of the statute,' as construed by the supreme court, and added a restriction upon the grant which is not to be found in the granting act.

"I am therefore of the opinion that the Department has not jurisdiction to determine the character of the land in controversy after issuance of patent. If it be true that the lands in question contain minerals in paying quantities, and that this fact was known to the officers or agents of the company at the date of selection, or date of patent, and they failed to make the fact known to the Department, such conduct was a fraud upon the Government, and the courts can grant relief."

It thus appears that the Land Department has regarded

the issuing of such a patent as a determination of the non-mineral character of the land and as effectually and unconditionally passing the title. There has been no departmental decision to the contrary. Indeed, on December 10, 1903, the Secretary of the Interior directed that the excepting clause be omitted from future patents, because he regarded it as without any warrant in law and void. 32 L. D. 342.

This clause was extensively considered by Circuit Judge Sawyer in *Cowell* v. *Lammers*, 21 Fed. Rep. 200. The patent in that case had been issued under the Central Pacific grant. The suit was to enjoin a trespass in the nature of waste, the complainant being the grantee of the railroad company and the defendant a miner who had located part of the patented tract as a lode mining claim. He had applied to the Land Department to enter the claim under the mining law, and his application had been rejected because the patent was outstanding. In granting the injunction the court said (p. 206): "The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant, and be void as an exception. Is it any the less so, in this class of cases, as to a part? . . . There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent." Again (p. 208): "A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant [patent] itself whether anything is granted or not, and, if anything be granted, what

it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

In principle, the effect of the excepting clause in the patent is not an open one, under the decisions of this court. It is foreclosed by what has been held upon full consideration. In *Deffeback* v. *Hawke*, 115 U. S. 392, where was involved the right to certain valuable townsite improvements upon land patented as a placer mining claim, the contention was advanced that as the owner of the improvements was the prior occupant the patent should have contained a reservation excluding them and all rights necessary to their enjoyment from its operation, but the contention was declared untenable, the court saying (p. 406): "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed." The case of *Davis* v. *Weibbold*, 139 U. S. 507, directly involved the validity of a clause in a townsite patent declaring that no title should be thereby "acquired to any mine of gold, silver, cinnabar or copper." By the mining laws mineral lands were withdrawn from disposal under other laws and the townsite law specially declared that no title to any mine of gold, silver, cinnabar, or copper should be acquired under its provisions. The defendant claimed under the townsite patent and a deed of release and quit-claim from the probate judge, who was the townsite trustee, and the plaintiff claimed under a later patent for a mining claim located upon part of the townsite and based upon an actual discovery of a valuable vein of gold after the issue of the townsite patent.

The decision and the reasons for it are fully comprehended in the following extracts from the opinion:

(p. 519) "The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditures for its extraction, and known to be so at the date of the grant." (As shown in *Barden* v. *Northern Pacific Railroad Co.*, [19 L. D. 188] the word "grant" here means the patent and not the act making the grant.)

(p. 524) "It would seem from this uniform construction of that Department [1] of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant [patent] known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback* v. *Hawke*, already referred to, and in the cases of the *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 328, and *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683."

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[1] The reference is to several Land Department decisions cited and reviewed in that opinion.

(p. 525) "It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results."

(p. 527–8) "But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. *Deffeback* v. *Hawke*, 115 U. S. 392, 406. . . . The laws of Congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of

private individuals, can be patented under any proceedings before the Land Department, or otherwise."

The case of *Shaw* v. *Kellogg*, 170 U. S. 312, related to a claim or right, conferred by statute, entitling its owner to select in a body about 100,000 acres "of vacant land, not mineral," in New Mexico, it being the duty of the Surveyor General "to make survey and location of the lands so selected," and this action being subject to the supervision of the Commissioner of the General Land Office. The owner of the right having made the selection, applied to the surveyor general in 1862 for the survey and location of the tract, and that officer reported the application to the Commissioner, saying in that connection that he had theretofore been informed that the purpose of the owner was to make such a selection as "would cover rich minerals in the mountains." The Commissioner replied that it was essential to the approval of the application by him that "it be accompanied by the certificates of the surveyor general and the register and receiver that the land selected is vacant and not mineral." Such certificates were furnished, but the Commissioner hesitated to act upon them because they were not based upon personal knowledge, but information informally elicited from others, the lands being remote and in an unsurveyed region. Finally, the Commissioner concluded that "the difficulty" could "be avoided" by directing the Surveyor General to proceed and in approving the survey to add to his certificate of approval "the special reservation stipulated by the statute, but not to embrace mineral land." Being instructed accordingly, the Surveyor General, after the field notes and plat of the survey were completed, endorsed upon the field notes a mere approval and upon the plat an approval qualified by the words "subject to the conditions and limitations" of the statute, naming it. The field notes and plat were then forwarded to and accepted by the Commis-

sioner. No patent was issued, the approved survey taking the place of one under the statute. A few years later, when inquiries were made respecting the right of prospectors to take advantage of mineral discoveries in the tract, the Commissioner took the position that the approval of the survey operated as a determination that the land was of the class and character designated in the act; that the title had passed from the Government, and that, notwithstanding the apparently conditional approval, the Land Department was without authority to reopen the question of the character of the land. The case, as presented to this court, involved the possession of a mine located within the tract after the approval of the survey. The plaintiff claimed under the selection of 1862 and the defendant under the mining laws, the controversy turning upon the effect to be given to the condition in the approval of the survey. In disposing of that question the court reaffirmed and applied its rulings in *Deffeback* v. *Hawke*, and *Barden* v. *Northern Pacific Railroad Co.*, *supra*, and said (p. 337):

"What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was an agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the Surveyor General to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Un-

doubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, preemption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether."

(p. 341) "But, it is said, no patent was issued in this case, and therefore the holding in the *Barden Case*, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent,' or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued."

(p. 343) "While the approval entered upon the plat by the Surveyor General under the direction of the Land Department was in terms 'subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860,' such limitation was beyond the power of executive officers to impose."

According to the statute relating to placer mining claims

the patent, save in an instance not material here, should contain an exception of any vein or lode *known* to exist within the boundaries of the claim *at the date of the application for patent*, but in the early patents the exception was so stated that it embraced any vein or lode *claimed or known* to exist *at the date of the patent*. The change was a material one, not only because of the difference between "claimed" and "known" but also because a year or so sometimes elapsed between the date of the application and that of the patent, and in the meantime a vein or lode might be discovered within the boundaries of the placer claim. Ultimately cases presenting the question of the effect of the exception as stated in the patents came before this court, and it was held that "the exception of the statute cannot be extended by those whose duty it is to supervise the issuing of the patent." *Sullivan* v. *Iron Silver Mining Co.*, 143 U. S. 431, 441, and cases cited.

These decisions are applicable and controlling here. The reasoning upon which they proceed compels their reaffirmance, and, besides, they have come to be recognized as establishing a rule of property. Not only has the Land Department accepted them as determinative of the invalidity of the excepting clause now before us, but innumerable titles within the limits of the western railroad land grants have been acquired with a like understanding and are now held in the justifiable belief that they are impregnable.

We come now to a contention which seeks to distinguish patents under this grant from those under other railroad grants. It is that the insertion of the excepting clause in the former was expressly authorized by Congress. Evidently this has not been the view of the Land Department. It not only began to use the clause before this grant was made, but used it in all patents of this class; and when, in December, 1903, its use was discontinued, the order embraced this grant along with the others. But passing

this as suggestive but not controlling, we turn to the joint resolution of June 28, 1870, upon which the contention is rested. Its chief purpose was to sanction a route which the Secretary of the Interior had disapproved. *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519, 523. It reads as follows (16 Stat. 382, * No. 87):

"That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

It will be observed that there is no direct mention of mineral lands, nor any indirect reference to them save such as is involved in the general mention of the "conditions and restrictions" of § 3 of the granting act.

As stated in one of the briefs, the contention is this: "The resolution provided in express terms that these

patents should cover all of the lands coterminous with the constructed sections of the railroad, and in effect provided that the patents should save and reserve the lands excepted by the provisions of section 3 of the original granting act, which included the exception of mineral lands." In other words, it is meant that the resolution required that all the odd-numbered sections within the primary limits of the grant and coterminous with the constructed road should be patented to the railroad company without any inquiry or investigation to determine which of those sections were sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of at the date of definite location, or were mineral, and that a general exception conforming to that in the granting act was to be inserted in the patents. This would mean that lands already sold were to be patented to the company, that reserved lands were to be patented to it, and that lands occupied by homestead settlers or preëmpted were to be dealt with in the same way; in short, that the grant, instead of being administered and adjusted in an orderly way by the officers customarily charged with that duty and in possession of the records and data without which little could be done, was to be administered and adjusted in the courts through the ordinary channels of litigation. Manifestly, that is not what Congress contemplated. It did not intend that the company's title should be so uncertain, and clearly it did not intend that the title to lands already sold or those reserved should be thus beclouded or that homesteaders and preëmptioners should be placed in a situation which would be so embarrassing and discouraging to them. What would become of the indemnity provisions under that theory? Certainly, it was not intended that the company should receive a patent for lands in the place limits and also indemnity for the same lands. We think there is a more reasonable view of the provision in the resolution than the one suggested. Omit-

ting its saving clause, the provision is not materially different from § 4 of the original act, being the section providing for patents. As already said, the chief purpose of the resolution was to sanction a route—the one indicated on the map mentioned. The Secretary of the Interior had disapproved it because not within prior authorization. If it was to be approved it was but reasonable that the existing right to the patents should be applied to it. This evidently is what was intended. Another matter also claimed consideration. Three years had passed since the filing of the map, and in the meantime the situation had been complicated by a withdrawal of the adjacent lands, a revocation of the withdrawal and a suspension of the revoking order. The validity of the route shown on the map and of the withdrawal had been the subject of differing opinions, and some of the lands had come to be occupied by settlers, whose status was uncertain in view of the withdrawal. See 16 Op. A. G. 80. As reported to the Senate by one of its committees, the resolution was in its present form without the saving clause. That was added when the resolution was under consideration.[1] Without it the resolution had two purposes, one to sanction the route which had been pronounced unauthorized, and the other to make secure the right to patents along that route. What was the purpose of the saving clause? Its words and the situation just mentioned leave no doubt that one purpose was to take care of the actual settlers then on the lands. Another, equally plain, was to require that the conditions and restrictions, that is, the exclusions and exceptions, of § 3 (the granting section) of the original act be applied to that route. But how were these purposes to be accomplished? Was it to be by patenting all the lands to the railroad company, even those occupied by

[1] Congressional Globe, 41st Cong., 2d Sess., parts 4 and 5, pp. 3349–3351, 3828–3830, 3950–3953.

actual settlers, and inserting saving clauses in the patents? Or was it to be by giving effect to the rights of the settlers and to the exclusions and exceptions in the normal and rational way, that is, by patenting to the company no lands occupied by actual settlers or otherwise excluded or excepted from the grant? The latter seems to us the only admissible conclusion.[1]

Lastly, it is urged that the railroad company accepted the patent with the mineral-land exception therein and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals but agents of the law, and must heed only its will. *Deffeback* v. *Hawke*, 115 U. S. 392, 406; *Davis* v. *Wiebbold*, 139 U. S. 507, 527; *Shaw* v. *Kellogg*, 170 U. S. 312, 337, 343. Nor can they indirectly give effect to what is unauthorized when done directly. Of course, if they enter into any forbidden arrangement whereby public land is transferred to one not entitled to it the patent may be annulled at the suit of the Government, but they cannot alter the effect which the law gives to a patent while it is outstanding.

Taking up the several questions in the light of what we have here said, we answer them as follows:

1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to

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[1] See *Tome* v. *Southern Pacific R. R. Co.*, 5 Copp's L. O. 85; *Southern Pacific R. R. Co.* v. *Rahall*, 3 L. D. 321.

be such at or prior to the date of the patent of July 10, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant but excluded from it, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (*Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174–175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. *McLaughlin* v. *United States*, 107 U. S. 526; *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510.

3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.

4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.

5. Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.

6. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.

7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Answer.—No; such an agreement is of no greater force as an estoppel than the exception in the patent. The latter being void, the patent passes the title and is not open to collateral attack or to attack by strangers whose only claim was initiated after the issue of the patent.